CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, December 21, 2005,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

Sandra L. Bell for MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

19 CFR PART 177

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF CHOCOLATE CONFECTIONERIES

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of ruling letter and revocation of treatment relating to the classification of chocolate confectioneries.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) is modifying a ruling letter pertaining to the tariff classification of chocolate confectioneries and revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the

proposed modification was published in the Customs Bulletin of October 26, 2005, Vol. 39, No. 44. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after March 5, 2006.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, Tariff Classification and Marking Branch, 202–572–8778.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §*1484*) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on October 26, 2005, in the Customs Bulletin, Volume 39, Number 44, proposing to modify New York Ruling Letter (NY) C86680, dated May 21, 1998, pertaining to the tariff classification of chocolate confectioneries under the Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in reply to the notice.

In NY C86680, dated May 21, 1998, the classification of chocolate covered peanuts, almonds and pralines imported in bulk was determined to be in subheading 1806.90.9011 or 1806.90.9019, HTSUS, depending on the ingredients. Since the issuance of that ruling, CBP has had a chance to review the classification of this merchandise and

has determined that classification is in error and that the product is properly classified in subheading 1806.90.55 or 1806.90.59, HTSUS, depending on whether the quantities provided for in the relevant quota has been filled.

As stated in the proposal notice, this modification will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this notice.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is modifying NY C86680, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 967865 (*see* "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

Dated: December 14, 2005

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967865
December 14, 2005
CLA–2 RR:CTF:TCM 967865ptl
CATEGORY: Classification
TARIFF NO.: 1806.90.55, 1806.90.59

MR. PIERRE MERHEJ
30 Basset Road
Brockton, MA 02401

RE: Sugar and Chocolate Coated Confections; Modification of NY C86680

DEAR MR. MERHEJ:

On May 21, 1998, the Customs National Commodity Specialist Division, in New York, issued you a ruling, NY C86680, on behalf of Edibles S.A.R.L. of Beirut, Lebanon, that classified four varieties of sugar or chocolate coated candies in subheadings of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). These products were to be imported either in bulk or packaged for retail sale.

Since that ruling was issued, Customs and Border Protection (CBP) has determined that the ruling contains errors regarding the classifications of the products when imported in bulk. This document corrects those errors.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by Title VI, a notice was published in the October 26, 2005, CUSTOMS BULLETIN, Volume 39, Number 44, proposing to modify NY C86680, and to revoke any treatment accorded to substantially identical transactions. No comments were received in response to the notice.

FACTS:

Your initial ruling request asked the National Commodity Specialist Division to provide you with the classification of five varieties of sugar-coated candies under the HTSUS. Because the inquiry lacked sufficient information about one product, only four products were classified. "Roasted Almonds Covered with Sugar" were classified in subheading 1704.90.1000, HTSUSA, which provides for "Sugar confectionery (including white chocolate), not containing cocoa: Other: Confections or sweetmeats ready for consumption: Candied nuts." "Milk Chocolate Covered Peanuts Coated with Sugar" were classified in subheading 1806.90.9011, HTSUSA, which provides for "Chocolate and other food preparations containing cocoa: Other: Other . . . Confectionery: Containing peanuts or peanut products." The products "Dark Chocolate Covered Almonds Coated with Sugar" and "Milk Chocolate Praline Coated with Sugar" were both classified in subheading 1806.90.9019, HTSUSA, which provides for "Chocolate and other food preparations containing cocoa: Other: Other . . . Confectionery: Other."

Although your classification request indicated that the products would be imported either in bulk or packaged for retail sale, NY C86680 did not provide classifications for both situations.

The classification of the Roasted Almonds Covered with Sugar is not dependent on the packaging of the product and will remain unchanged. However, the classification of the chocolate-covered products does depend on the type of packaging and the ruling should have provided classifications for both instances when the product would be imported in bulk and when the product was imported packaged for retail sale. This ruling modifies NY

C86680 to provide the classifications when imported in bulk. The classification provided for the products packaged for retail sale is correct and is not affected by this ruling.

ISSUE:

What is the classification of chocolate covered confections when imported in bulk not packaged for retail sale?

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

Although the products under consideration for classification all contain chocolate and are classified in Chapter 18, HTSUS, which provides for "Cocoa and Cocoa Preparations," they also contain a significant amount of sugar. Information provided with the classification request indicates that the dark chocolate covered almonds covered with sugar contain 74.72 percent sugar, the milk chocolate covered peanuts coated with sugar contain 45.24 percent sugar, and the milk chocolate praline covered with sugar contains 47.8 percent sugar.

Because of these ingredients, the HTSUS subheadings under consideration are as follows:

1806	Chocolate and other food preparations containing cocoa:
	Other:
	Other:
	Other:
	Other:
	Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17:
1806.90.5500	Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions
1806.90.5900	Other[1]
1806.90.9000	Other

[1] See subheadings 9904.17.49–9904.17.65

Because these chocolate products all contain over 10 percent by weight sugar, we must consider whether they are described by additional U.S. note 3 to chapter 17 which provides:

> 3. For the purposes of this schedule, the term "articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17" means articles containing over 10 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, except (a) articles not principally of crystalline structure or not in dry amorphous form, the foregoing that are prepared for marketing to the ultimate consumer in the identical form and package in which imported; (b) blended syrups containing sugars derived

from sugar cane or sugar beets, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported; (c) articles containing over 65 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported; or (d) cake decorations and similar products to be used in the same condition as imported without any further processing other than the direct application to individual pastries or confections, finely ground or masticated coconut meat or juice thereof mixed with those sugars, and sauces and preparations therefor.

Additional U.S. note 2, Section IV, HTSUS, defines the terms of Additional U.S. note 3, Chapter 17, HTSUS, as follows:

> For the purposes of this section, unless the context otherwise requires—
>
> (a) the term "percent by dry weight" means the sugar content as a percentage of the total solids in the product;
>
> (b) the term "capable of being further processed or mixed with similar or other ingredients" means that the imported product is in such condition or container as to be subject to any additional preparation, treatment or manufacture or to be blended or combined with any additional ingredient, including water or any other liquid, other than processing or mixing with other ingredients performed by the ultimate consumer prior to consumption of the product;
>
> (c) the term "prepared for marketing to the ultimate consumer in the identical form and package in which imported" means that the product is imported in packaging of such sizes and labeling as to be readily identifiable as being intended for retail sale to the ultimate consumer without any alteration in the form of the product or its packaging; and
>
> (d) the term "ultimate consumer" does not include institutions such as hospitals, prisons and military establishments or food service establishments such as restaurants, hotels, bars or bakeries.

The chocolate products which are imported in bulk are not "prepared for marketing to the ultimate consumer in the identical form and package in which they are imported." Therefore, they are described by the terms of additional U.S. note 3 and are therefore subject to the quota under additional U.S. note 8 to Chapter 17 and are classified in subheadings 1806.90.55, HTSUS, and 1806.90.59, HTSUS. The chocolate products packaged for retail sale are "prepared for marketing to the ultimate consumer in the identical form and package in which they are imported" and will remain classified in the same subheadings they were in NY C86680.

HOLDING:

The products "Dark Chocolate Covered Almonds Covered with Sugar," "Milk Chocolate Covered Peanuts Coated with Sugar," and "Milk Chocolate Praline Covered with Sugar," described in NY C86680, dated May 21, 1998, when imported in bulk are classified in subheading 1806.90.55, HTSUS, which provides for "Chocolate and other food preparations containing cocoa:

Other: . . . Other: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions." The 2005 general duty rate is 3.5 percent *ad valorem*. When the quantities provided for in additional U.S. note 8 to Chapter 17 have been filled, the products will be classified in subheading 1806.90.59, HTSUS, which provides for "Chocolate and other food preparations containing cocoa: Other: . . . Other: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Other." The 2005 general duty rate for this over-quota subheading is 37.2¢/kg plus 6 percent *ad valorem* and such additional duties as may be imposed in chapter 99, HTSUS.

The classifications provided by NY C86680 for all products that are imported packaged for retail sale remain unchanged by this ruling, as does the classification for the product described as "Roasted Almonds Covered with Sugar."

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

NY C86680, dated May 21, 1998, is modified in accordance with this ruling.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

19 CFR PART 177

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF AN ITEM DESCRIBED IN ERROR AS AN ETHERNET CARD

AGENCY: U.S. Customs and Border Protection ("CBP"), Department of Homeland Security.

ACTION: Notice of revocation of a ruling letter and treatment relating to tariff classification of an item described, in error, as an Ethernet card under the Harmonized Tariff Schedule of the United States ("HTSUS").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CBP is revoking one ruling pertaining to the tariff classification of an item described as an Ethernet card under the HTSUS and any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed revocation was published on October 26, 2005, in the CUS-

TOMS BULLETIN, Volume 39, Number 44. No comments were received in response to this notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 5, 2006.

FOR FURTHER INFORMATION CONTACT: Deborah Stern, Tariff Classification and Marking Branch (202) 572–8785.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), CBP published a notice in the October 26, 2005 CUSTOMS BULLETIN, Volume 39, Number 44, proposing to revoke NY K87985, dated August 4, 2004, and to revoke any treatment accorded to substantially identical transactions regarding the tariff classification of an item described in error as an Ethernet card. No comments were received in response to the proposed action.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this final decision

In NY K87985, CBP classified a good identified and described as an Ethernet circuit card in subheading 8471.80.1000, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), which provides in relevant part for units of automatic data processing machines. However, the manufacturer and importer have informed CBP that the card we classified was misidentified and misdescribed. That is, the part number we identified does not exist, and the ruling's description of an Ethernet card is not the description associated with the line card for which the ruling was requested. CBP's review of relevant product literature supports this conclusion. As the ruling is based upon a part number that does not exist the ruling is being revoked.

However, CBP is taking the opportunity to replace the ruling with a new ruling on the correct part number and correct description of a line card for network switching. CBP has determined it should be classified in heading 8517, specifically subheading 8517.90.4400, HTSUSA, which provides for " "Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones; parts thereof: Parts: Other: Printed circuit assemblies: For telegraphic apparatus."

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY K87985 and any other ruling not specifically identified to reflect the proper classification of the subject merchandise or substantially similar merchandise, pursuant to the analyses set forth in HQ 967631, set forth as the attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical merchandise.

In accordance with 19 U.S.C 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: December 14, 2005

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[Attachment]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967631
December 14, 2005
CLA–2 RR: CTF: TCM 967631 DBS
CATEGORY: Classification
TARIFF NO.: 8517.90.4400

MR. RICHARD ZUPITO
MONTGOMERY INTERNATIONAL, INC.
341 Erickson Ave.
Essington, PA 19029

RE: Revocation of NY K87985; Classification of line cards for network switches

DEAR MR. ZUPITO:

On August 5, 2004, the Director, National Commodity Specialist Division, issued to you on behalf of Data Q Internet Equipment Co ("Data Q"), New York Ruling Letter (NY) K87985, classifying what was understood at the time to be a Cisco Ethernet circuit card in subheading 8471.80.1000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as a unit of an automatic data processing (ADP) machine. According to new information submitted to this office by counsel for Cisco Systems, Inc. ("Cisco") and confirmed by Data Q, the good subject to the ruling was identified by an incorrect part number and the description is that of an entirely different card. This ruling constitutes a revocation of NY K87985 and a binding ruling on the classification for the line card properly identified and described below.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of the above-identified ruling was published on October 26, 2005, in the CUSTOMS BULLETIN, Volume 39, Number 44. No comments were received in response to the notice.

FACTS:

The merchandise in NY K87985 was described in relevant part as follows:

> WS-X4148RJ45 Ethernet Card. The WS-X4148RJ45 is an Ethernet circuit card for use in the Cisco 4000 series switch family. It is designed to work only when inserted into an expansion slot within the Cisco 4000 series switches. The Cisco 4000 series switches are used in Local Area Network (LAN) and or in conjunction with a telecommunications network.

CBP was informed by counsel for Cisco that part number WS-X4148RJ45 does not exist; the actual part number is WS-X4148RJ45V (emphasis added). Further, the description matches not the WS-X4148RJ45V, but a different Cisco line card: a simple Ethernet card for LANs. Following this discovery, Data Q confirmed that the WS-X4148RJ45V line card is the merchandise for which the original ruling was requested, and not the good

described above (and incorrectly identified). We note that the confusion likely arose from the similarity of several part numbers and the variety of line cards described in the product literature website which accompanied the ruling request.

The WS-X4148RJ45V card is a 48-port switching line card (printed circuit assembly) with inline power for Cisco's Catalyst 4000 Series Switches for Internet Protocol (IP) telephony. The switches are used to create Virtual LANs between, e.g., corporate headquarters and branch offices in wide area networks. IP Telephony allows voice, data and video to be transmitted across a data network. Inline power, or "Power Over Ethernet" as described by Cisco is 48-volt DC power provided over standard Category 5 unshielded twisted-pair (UTP) cable up to 100 meters. The instant line card detects IP telephones and supplies power to them via the switch, in lieu of an electrical outlet. It permits the communication of telephone, fax and computers over a wide area. The card also provides an auxiliary VLAN feature which allows for configuration and network management of the VLANs while maintaining separate logical topologies for voice and data terminals. The card supports Cisco's Fast EtherCannel technology and the Link Aggregation standard used by Cisco's systems.

ISSUE:

Whether a line card for IP telephony is classified under heading 8517, Harmonized Tariff Schedule of the United States (HTSUS).

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. The ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. CBP believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings at issue are, in part, as follows:

8471	Automatic data processing machines and units thereof. . . .
	* * *
8517	Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones; parts thereof:

To be classified in heading 8471, as an ADP unit, the merchandise must meet all three requirements of Note 5(B) to Chapter 84, HTSUS, which provides that:

> Automatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph

(E) . . . a unit is to be regarded as being a part of a complete system if it meets all the following conditions:

(a) It is of a kind solely or principally used in an automatic data processing system;
(b) It is connectable to the central processing unit either directly or through one or more other units; and
(c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

Often, networked equipment can meet the requirements of Legal Note 5(B)(b) and 5(B)(c) to chapter 84, for the following reasons: they are connectable to the central processing unit either directly or through one or more other units; and, they are able to accept or deliver data in a form (codes or signals) which can be used by the system. Classification determinations often turn on whether networked equipment meet the terms of Legal Note 5(B)(a) to chapter 84, HTSUS. That is, CBP must determine whether the networked equipment is of a kind solely or principally used in an ADP system. Such a determination is consistent with CBP rulings on various networking equipment, including HQ 965047, dated June 19, 2002; HQ 963250, dated July 23, 2001; and HQ 963234 July 23, 2001.

In resolving this issue, importers must provide evidence of sole or principal use. An unsupported claim that these goods are solely or principally used in an ADP system is not evidence. The courts have provided the following factors to apply, which are indicative but not conclusive, when determining the principal use of merchandise: general physical characteristics; expectation of the ultimate purchaser; channels of trade; environment of sale (accompanying accessories, manner of advertisement and display); use in the same manner as merchandise which defines the class; economic practicality of so using the import; and recognition in the trade of this use. See Lenox Collections v. United States, 19 Ct. Int'l Trade 345, 347 (1995); Kraft, Inc. v. United States, 16 Ct. Int'l Trade 483 (1992); G. Heileman Brewing Co. v. United States, 14 CIT 614 (1990). See also United States v. Carborundum Company, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), cert. denied, 429 U.S. 979 (1976).

Information obtained from Cisco and confirmed by you, the importer, indicates that this line card is used exclusively in Cisco Catalyst 4000 Series Switches for IP telephony, which transmits voice, video and data over multimode Fast Etherchannel Links. The expectation of the ultimate purchasers, which are large enterprises including Internet Service Providers, is to transmit voice, video and data services over public or private lines, IP phone autodetection, in-line power and configuration of multiple Virtual LANs (VLANs) over wide areas. The channels of trade and environment of sale for this line card are large enterprises for communication networks between corporate headquarters and branch locations. Because of its sole use in switches for IP telephony, their use is consistent with other apparatus for line telephony or line telegraphy, not simple Ethernet cards for use in an ADP system. We conclude the instant line card is not of a kind solely or principally used in an ADP system. As it does not satisfy Note 5(B)(a), Ch. 84, it cannot be classified in heading 8471, HTSUS.

In light of the card's use in line telephony and telegraphy, we turn to heading 8517, HTSUS. Explanatory Note (III)(A) to heading 8517 describes

the automatic telephonic or telegraphic switching apparatus in relevant part as follows:

> These are of many types. The key feature of a switching system is the ability to provide, in response to coded signals, an automatic connection between users. Automatic switchboards and exchanges may operate by means of circuit switching, message switching or packet switching which utilize microprocessors to connect users by electronic means. Many automatic switchboards and exchanges incorporate analogue to digital converters, digital to analogue converters, data compression/decompression devices (codecs), modems, multiplexors, automatic data processing machines and other devices that permit the simultaneous transmission of both analogue and digital signals over the network, which enables the integrated transmission of speech, other sounds, characters, graphics, images or other data.

As demonstrated by the facts above, the switches that the WS-X4148RJ45V card supports provide an automatic connection between users (e.g., of the VLANs) for the transmission of signals over a network, which enables the integrated transmission of speech, other sounds, characters, graphics, images or other data (i.e., IP telephony). Thus, they are included in heading 8517, HTSUS, as electrical apparatus for line telephony and line telegraphy. The line card at issue is a printed circuit assembly used exclusively with these switches, detecting and powering IP telephones through the switch.

It is a well-established rule that a 'part' of an article is an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article." United States v. Willoughby Camera Stores, Inc., 21 CCPA 322, 324, T.D. 46,851 (1933) (emphasis in original), cert denied, 292 U.S. 640 (1934). In determining whether an item is a part of an article, the Court looks to the "nature, function, and purpose of an item in relation to the article to which it is attached or designed to serve . . ." Ideal Toy Corp. v. United States, 58 CCPA 9, 13, C.A.D. 996, 433 F. 2d 801, 803 (1979). However, a device may be considered a part of an article even though the device is not necessary to the operation of the article, provided that once the device is installed the article cannot function properly without it. United States v. Antonio Pompeo, 43 C.C.P.A. 9, C.A.D. 602 ((Cust. & Pat. App., 1955). To meet this requirement, the device must be dedicated for use upon the article. See Beacon Cycle Supply Co., Inc. v. United States, 81 Cust. Ct. 46, 50–51 C.D. 4764 (1978).

Further, EN 85.17 states that subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), parts of the apparatus of this heading are also classified here. Section XVI, Note 2 (b) provides that parts that are not themselves goods of another heading and are suitable for use solely or principally with a particular machine of Chapters 84 or 85 are to be classified with those machines. Based upon our review of the product literature, the line card, being designed for inline power and exclusively used with the particular series of switches for a inline power multi-service communications infrastructure, is classifiable as a part of the apparatus of heading 8517, HTSUS. As the switch to which this is a part transmits voice and data, it would be classified as telegraphic apparatus. Thus, the line card is classified as a printed circuit assembly for telegraphic apparatus.

HOLDING:

The Cisco WS-X4148RJ45V is classified in heading 8517, HTSUS. It is specifically provided for in subheading 8517.90.4400, HTSUSA, as "Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones; parts thereof: Parts: Other: Printed circuit assemblies: For telegraphic apparatus." The 2005 column one rate of duty is free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY K87985, dated August 5, 2004, is hereby REVOKED. In accordance with 19 U.S.C 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

19 CFR PART 177

PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF MICROWAVE POPCORN

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to the classification of microwave popcorn.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke a ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of microwave popcorn and to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before February 3, 2006.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229. Submitted com-

ments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at 202–572–8768.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, Tariff Classification and Marking Branch, 202–572–8778.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke a ruling letter pertaining to the tariff classification of microwave popcorn. Although in this notice CBP is specifically referring to one ruling, New York Ruling Letter (NY) H83710, dated July 16, 2001, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to sub-

stantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In NY H83710, dated July 16, 2001, the classification of a product commonly referred to as microwave popcorn was determined to be in subheading 1005.90.4040, HTSUS, which provides for corn (maize), other, other, popcorn. This ruling letter is set forth in "Attachment A" to this document. Since the issuance of that ruling, CBP has had a chance to review the classification of this merchandise and has determined that the classification is in error. Because of the addition of other ingredients to the microwave corn, the product constitutes a preparation of corn kernels for popping and is properly classified in subheading 2008.19.9090, HTSUS, which provides for fruit, nuts and other edible parts of plants, nuts, peanuts (ground-nuts) and other seeds, other, other.

CBP, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY H83710, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 967900 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: December 14, 2005

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY H83710
July 16, 2001
CLA–2–10:RR:NC:2:231 H83710
CATEGORY: Classification
TARIFF NO.: 1005.90.4040

MS. ANDREA MILLER
COSTCO WHOLESALE
999 Lake Drive
Issaquah, WA 98027

RE: The tariff classification of microwave buttered popcorn from Mexico.

DEAR MS. MILLER:

In your letter, dated July 9, 2001, you requested a classification ruling.

The merchandise is comprised of "Act II" brand microwave buttered popcorn. The popcorn is available in three flavors – "butter," "extra butter," and "natural." "Butter" popcorn contains popcorn (maize), partially hydrogenated vegetable oil, salt, natural flavoring, and achiote (coloring). "Extra butter" popcorn contains popcorn (maize), partially hydrogenated vegetable oil, salt, natural and artificial flavoring, and achiote. "Natural" popcorn contains popcorn (maize), partially hydrogenated soybean oil, and salt. All flavoring and seasoning are contained in each package. The packages are designed to be heated in the microwave. Each package is 99 grams and will be sold in boxes of 28 packages.

The applicable subheading for microwave buttered popcorn will be 1005.90.4040, Harmonized Tariff Schedule of the United States (HTS), which provides for corn (maize), other, other, popcorn. The general rate of duty will be 0.25 cents per kilogram.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Thomas Brady at 212–637–7064.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967900
CLA–2 RR:CTF:TCM 967900ptl
CATEGORY: Classification
TARIFF NO.: 2008.19.9090

MS. ANDREA MILLER
COSTCO WHOLESALE
999 Lake Drive
Issaquah, WA 98027

RE: Microwave Buttered Popcorn; Revocation of NY H83710

DEAR MS. MILLER:

On July 16, 2001, the Customs and Border Protection (CBP) National Commodity Specialist Division, in New York, issued New York Ruling Letter (NY) H83710 to you classifying "Act II" brand microwave buttered popcorn under the Harmonized Tariff Schedule of the United States (HTSUS), in subheading 1005.90.4040, HTSUS, which provides for corn (maize), other, other, popcorn. CBP has had occasion to review that ruling and, for the reasons stated below, has determined that it is in error. This letter revokes NY H83710 and provide the correct classification for microwave buttered popcorn.

FACTS:

The "Act II" brand popcorn products under consideration in NY H83710 are available in three flavors. "Butter" popcorn contains popcorn (maize), partially hydrogenated vegetable oil, salt, natural flavoring, and achiote (coloring). "Extra butter" popcorn contains popcorn (maize), partially hydrogenated vegetable oil, salt, natural and artificial flavoring, and achiote. "Natural" popcorn contains popcorn (maize), partially hydrogenated vegetable oil, and salt. The flavorings and seasonings are packaged together with the popcorn in individual 99 gram packages that are designed to be heated in a microwave. The individual packages will be sold in boxes containing 28 packages.

ISSUE:

Whether packages of popcorn and other ingredients for use in microwave ovens are mixtures or preparations?

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the

official interpretation of the Harmonized System at the international level. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS subheadings under consideration are as follows:

1005	Corn (maize):
	* * *
1005.90	Other:
	* * *
1005.90.40	Other
1005.90.4040	Popcorn
2008	Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included:
	Nuts, peanuts (ground-nuts) and other seeds, whether or not mixed together:
	* * *
2008.19	Other, including mixtures:
	* * *
	Other, including mixtures:
2008.90.90	Other
2008.19.9090	Other

As imported, the packages of microwave popcorn consist of kernels of corn (maize) that have been mixed with specific proportions of partially hydrogenated vegetable oil, salt, natural or artificial flavoring, and, in some, achiote (coloring). These packages are marketed to consumers who will purchase and use the products as offered, without any further preparation on their part.

According to Note 1 (b) to Chapter 10, grains which have been hulled or otherwise worked are excluded from Chapter 10. Additionally, the General Explanatory Notes to Chapter 10 provide, in relevant part, that "This Chapter covers cereal grains only, ..." Since the products at issue have been prepared by treating with partially hydrogenated vegetable oil, salt, and other ingredients, they are excluded from Chapter 10 and they should not be classified in subheading 1005.90.4040, HTSUS.

It is CBP's opinion that the specific ingredient composition of these products has advanced them from being mixtures of popcorn kernels and other ingredients to products that are preparations consisting of popcorn kernels with specific additional ingredients which are designed to facilitate the popping of the kernels and which have been included to impart a specific taste or flavor to the finished product.

Based on this analysis, the microwave popcorn packages are preparations provided for in heading 2008, HTSUS, which provides for "fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not

containing added sugar or other sweetening matter or spirit, not elsewhere specified or included."

HOLDING:

Microwave popcorn packages consisting of popcorn (maize), partially hydrogenated vegetable oil, natural and/or artificial flavor and, possibly, coloring, and salt, and designed for use with microwave ovens are classified in subheading 2008.19.9090, HTSUS, which provides for "Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Nuts, peanuts (ground-nuts) and other seeds, whether or not mixed together: Other, including mixtures: Other, including mixtures: Other, Other." The 2005 duty rate is 17.9% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

NY H83710, dated July 16, 2001, is revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF EVEROLIMUS

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Proposed revocation of a tariff classification ruling letter and revocation of treatment relating to the classification of Everolimus.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that Customs and Border Protection (CBP) is proposing to revoke one ruling letter relating to the tariff classification of Everolimus under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP is also proposing to revoke any treatment previously accorded by it to substantially identical merchandise.

DATE: Comments must be received on or before February 3, 2006.

ADDRESS: Written comments are to be addressed to the Bureau of Customs and Border Protection, Office of Regulations & Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at the offices of U.S. Customs and Border Protection, 799 9th Street, NW, Washington, D.C. during regular business

hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Kelly Herman, Tariff Classification and Marking Branch: (202) 572–8713.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of Everolimus. Although in this notice, CBP is specifically referring to the revocation of New York Ruling Letter (NY) R00794, dated September 16, 2004 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice

period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY R00794, CBP ruled that Everolimus was classified in subheading 2934.99.4700, HTSUSA, which provides for "Nucleic acids and their salts, whether or not chemically defined; Other heterocyclic compounds: Other: Other: Other: Drugs." Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error, and that Everolimus should be classified in subheading 2941.90.5000, HTSUS, which provides for "Antibiotics: Other: Other: Other."

Pursuant to 19 U.S.C. 1625(c)(1), CBP is proposing to revoke NY R00794 and any other ruling not specifically identified, to reflect the proper classification of Everolimus according to the analysis contained in Headquarters Ruling Letter (HQ) 967895, set forth as Attachment B to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

DATED: December 14, 2005

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY R00794
September 16, 2004
CLA–2–30:RR:NC:2:238 R00794
CATEGORY: Classification
TARIFF NO.: 2934.99.4700

JAMES C. MCMAHON, Ph.D.
GUIDANT CORPORATION
26531 Ynez Road
Temecula, CA 92591

RE: The tariff classification of Everolimus (CAS–159351–69–6), imported in bulk form, from Switzerland

DEAR DR. MCMAHON:

In your letter dated September 3, 2004, you requested a tariff classification ruling.

The subject product, Everolimus, a macrocyclic lactone (macrolide), is an investigational immunosuppressive drug currently awaiting approval, pursuant to a new drug application (NDA) filed with the FDA (NDA–21–560), for use in reducing graft vasculopathy. You have indicated, vía telephone, to a member of my staff that Everolimus is a semisynthetic derivative of Rapamycin, currently known as Sirolimus□. In this respect, we note that one of the chemical names for Everolimus is, in fact, 42-O-(2-hydroxyethyl)rapamycin. However, we are unable to find - nor have you furnished - any scientific evidence that - unlike Sirolimus - Everolimus has the ability to kill or inhibit the growth of microorganisms. Accordingly, pursuant to Lonza, Inc. v. U.S. [46 F.3d 1098 (Fed. Cir. 1995)] and the Explanatory Notes to heading 2941, HTS, it is our determination that Everolimus is precluded from classification as an antibiotic, for tariff purposes.

The applicable subheading for Everolimus, imported in bulk form, will be 2934.99.4700, Harmonized Tariff Schedule of the United States (HTS), which provides for "Nucleic acids and their salts, whether or not chemically defined; other heterocyclic compounds: Other: Other: Other: Drugs." The rate of duty will be 3.7 percent ad valorem. You state in your letter that "Everolimus should be eligible for Special Treatment pursuant to the Agreement on Trade in Pharmaceutical Products, Special Notes 'K' of the Harmonized Tariff Schedule of the United States, Supplement 1." However, please be advised that, at the present time, Everolimus is not listed in the Pharmaceutical Appendix to the Tariff Schedule.

This merchandise may be subject to the requirements of the Federal Food, Drug, and Cosmetic Act, which is administered by the U.S. Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number 1–888–443–6332.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is im-

ported. If you have any questions regarding the ruling, contact National Import Specialist Harvey Kuperstein at 646–733–3033.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967895
CLA–2 RR:CTF:TCM 967895 KSH
TARIFF NO.: 2941.90.5000

CARL D. CAMMARATA, ESQ.
LAW OFFICES OF GEORGE R. TUTTLE
Three Embarcadero Center, Suite 1160
San Francisco, CA 94111

RE: Revocation of New York Ruling Letter (NY) R00794, dated September 16, 2004; Classification of Everolimus.

DEAR MR. CAMMARATA:

This is in response to your letter of August 15, 2005, on behalf of your client Guidant Corporation, in which you request reconsideration of New York Ruling Letter (NY) R00794, issued on September 16, 2004, concerning the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of Everolimus. Everolimus was classified in subheading 2934.99.4700, HTSUS, which provides for "Nucleic acids and their salts, whether or not chemically defined; other heterocyclic compounds: Other: Other: Other: Drugs." You assert that because the merchandise at issue exhibits antifungal properties, it is classified in subheading 2941.90.5000, HTSUS, which provides for "Antibiotics: Other: Other: Other." In accordance with your request for reconsideration of NY R00794, CBP has reviewed the classification of this item and has determined that the cited ruling is in error.

FACTS:

Everolimus is a macrocyclic lactone immunosuppressive drug being investigated for use in reducing graft vasculopathy. Everolimus is a semisynthetic derivative of Rapamycin, currently known as Sirolimus. It is an organic compound which is stabilized with a second antioxidant organic compound. As such, Everolimus is a mixture of two organic compounds.

ISSUE:

Whether Everolimus is classified as an other heterocyclic compound of heading 2934, HTSUS, or as an antibiotic of heading 2941, HTSUS.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be de-

termined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (E.N.), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

Although Everolimus is a mixture of two organic compounds, Note 1 to Chapter 29, HTSUS, states that Chapter 29, HTSUS, includes single compounds with an added stabilizer. Inasmuch as the second compound is a stabilizer, a determination whether classification in Chapter 29, HTSUS, is proper is warranted.

Heading 2941, HTSUS, provides for antibiotics. The E.N. to 2941 states in relevant part:

> Antibiotics are substances secreted by living micro-organisms which have the effect of killing other micro-organisms or inhibiting their growth. They are used principally for their powerful inhibitory effect on pathogenic micro-organisms, particularly bacteria or fungi, or in some cases on neoplasms. They can be effective at a concentration of a few micrograms per ml in the blood.

In Lonza, Inc. v. U.S., 46 F.3d 1098 (Fed. Cir. 1995), the court stated that "antibiotics are commonly understood to mean substances, produced either naturally or synthetically, that exhibit an ability to kill or inhibit the growth of microorganisms." Id.

You have submitted additional information in your request for reconsideration which was not included in your original request that evidences that Everolimus is an antibiotic that has bacteriostatic properties that kill or inhibit the growth of microorganisms.

Based on this additional evidence, Everolimus is *prima facie* classifiable in heading 2941, HTUS, and heading 2934, HTSUS. However, Note 3 to Chapter 29, HTSUS, states:

> Goods which could be included in two or more of the headings of this chapter are to be classified in that one of those headings which occurs last in numerical order.

In accordance with Note 3 to Chapter 29, HTSUS, the E.N. to 2941, HTSUS, and Lonza, *supra*, Everolimus is classified in subheading 2941.90.5000, HTSUS.

HOLDING:

Everolimus is classified in subheading 2941.90.5000, HTSUS, which provides for "Antibiotics: Other: Other: Other." The general column one rate of duty is Free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:
NY R00794, dated September 16, 2004, is hereby revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

19 CFR PART 177

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF LAMINATED STEEL SHEET

AGENCY: U. S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: Notice of revocation of ruling letters and treatment relating to tariff classification of laminated steel sheet.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CBP is revoking five (5) rulings relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of laminated steel sheet, and is revoking any treatment CBP has previously accorded to substantially identical transactions. The merchandise is steel sheet laminated on at least one side with polyethylene or polyvinyl chloride. Notice of the proposed revocations was published in the October 19, 2005, Customs Bulletin, Vol. 39, No. 43. Two comments were received in response to this notice. In addition, an interested party involved in substantially identical transactions responded to the notice and advised CBP of another ruling affected by the proposed action. This ruling, too, is being revoked.

EFFECTIVE DATE: These revocations are effective for merchandise entered or withdrawn from warehouse for consumption on or after March 5, 2006.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification and Marking Branch (202) 572–8779.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many

sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's rights and responsibilities under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable CBP to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to CBP's obligations, a notice was published on October 19, 2005, in the Customs Bulletin, Volume 39, Number 43, proposing to revoke NY 893462, dated January 31, 1994, NY J86283, dated July 16, 2003, NY J85044, dated June 26, 2003, and NY I80611, dated April 19, 2002. Two comments were received in response to this notice. One commenter requested a clarification of the proposal but otherwise favored it, while the other commenter favored the revocations without comment. In addition, an interested party involved in substantially identical transactions advised CBP that NY H84957, dated August 30, 2001, was believed to be affected by CBP's proposed action. CBP agrees.

As stated in the proposed notice, these revocations will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised CBP during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment it previously accorded to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY 893462, NY J86283, NY J85044, NY I80611, and NY H84957 to reflect the proper classification of laminated steel sheet in provisions of Chapter 72, HTSUS, as flat-rolled products of iron or nonalloy steel, of other alloy steel, or of stainless steel, as appropriate, in accordance

with the analysis in HQ 967681, HQ 967682, HQ 967683, HQ 967684 and HQ 967984, which are set forth as Attachments A through E to this document, respectively. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), these rulings will become effective 60 days after publication in the Customs Bulletin.

DATED: December 14, 2005

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967681
December 14, 2005
CLA–2 RR:CR:GC 967681 JAS
CATEGORY: Classification
TARIFF NO.: 7210, 7212

MR. A. J. SPATARELLA
KANEMATSU USA INC.
114 West 47th Street, 23rd Floor
New York, NY 10036

RE: PVC Laminated Steel Sheet; NY 893462 Revoked

DEAR MR. SPATARELLA:

In NY 893462, which the then-Area Director of Customs, New York Seaport, issued to you on January 31, 1994, certain pvc laminated steel sheet was found to be classifiable as other articles of iron or steel, in subheading 7326.90.90 (now 7326.90.85), Harmonized Tariff Schedule of the United States (HTSUS).

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY 893462 was published on October 19, 2005, in the Customs Bulletin, Volume 39, Number 43. Two comments were received in response to this notice, both favoring the proposal, but without elaboration.

FACTS:

The merchandise was described in NY 893462 as unalloyed steel laminated on one side with polyvinyl chloride (pvc) and coated or plated on the reverse side with zinc metal. There is no further description of this merchandise nor any indication of its intended use.

The HTSUS provisions under consideration are as follows:

7210	Flat-rolled products of iron or nonalloy steel, of a width of 600 mm or more, clad, plated or coated:
7210.30.00	Electrolytically plated or coated with zinc
	Otherwise plated or coated with zinc:
7210.49.00	Other
*	* * *
7212	Flat-rolled products of iron or nonalloy steel, of a width of less than 600 mm, clad, plated or coated:
7212.20.00	Electrolytically plated or coated with zinc
7212.30	Otherwise plated or coated with zinc:
	Of a width of less than 300 mm:
7212.30.10	Of a thickness exceeding 0.25 mm or more
7212.30.30	Other
7212.30.50	Other
*	* * *
7326	Other articles of iron or steel
7326.90	Other:
	Other:
	Other:
7326.90.90 (now **90.85**)	Other

ISSUE:

Whether the merchandise, processed as described, is a product of Chapter 72.

LAW AND ANALYSIS:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Chapter 72, Note 1(k), HTSUS, defines Flat-rolled products, in part, in terms of thickness and width requirements, and includes those products with patterns in relief derived directly from rolling (for example, grooves, ribs, etc.) and those which have been perforated, corrugated or polished, provided that they do not thereby assume the character of articles or products of other headings. The pvc laminated steel sheet at issue meets these descriptions.

The Harmonized Commodity Description and Coding System Explanatory Notes (Ens) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the Ens provide a commentary on the scope of each heading of the HTSUS. U.S. Customs and Bor-

der Protection believes the Ens should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

EN 73.26 indicates the heading covers all iron or steel articles other than those included in the preceding headings of Chapter 73, or covered by Note 1 to Section XV or included in Chapters 82 or 83 or more specifically covered elsewhere in the Nomenclature. In addition, General Explanatory Note (IV)(c) to Chapter 72 indicates that the finished products of that chapter may be subjected to further finishing treatments or converted into other articles. Included are surface treatments or other operations to improve the properties or appearance of the metal, protect it against rusting and corrosion, etc. Except as otherwise provided in the text of certain headings, such treatments do not affect the heading in which the goods are classified. Among these treatments or operations are coating with metal, at General Explanatory Note (IV)(c)(2)(d)(iv), and lamination, at General Explanatory Note(IV)(c)(2)(g).

Uniting a pvc layer with a nonalloy steel sheet by an epoxy adhesive or otherwise constitutes a lamination. Typical applications for vinyl laminated steel is in the manufacturing sector, i.e., to give the high gloss look of stainless steel. Zinc is a commonly used coating that imparts corrosion resistance to steel. NY 893462 noted that lamination was not mentioned in any Legal or Explanatory Note as a process to which flat-rolled products may be subjected. Further, NY 893462 does not state the intended end use of the pvc laminated steel sheet at issue. Amendments to the Ens do not change the scope of the HTSUS headings but are a clarification of the current text. Notwithstanding the fact that General Explanatory Note (IV)(c) was not amended to add subparagraph (c)(2)(g) until 1998, it is apparent that individually, or in combination, these processes are designed to improve the properties or appearance of metal and to protect it against rust or corrosion. Therefore, the subject merchandise is provided for both in heading 7210 and in heading 7212. By its terms, heading 7326 is eliminated from consideration.

HOLDING:

Under the authority of GRI 1, the pvc laminated nonalloy zinc-coated steel sheet is provided for in heading 7210 or in heading 7212, HTSUS, depending on width. It is classifiable in the appropriate subheading based on thickness and manner of coating or plating. The column 1 rate of duty under all of these provisions is FREE.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov/tata/hts.

EFFECT ON OTHER RULINGS:

NY 893462, dated January 31, 1994, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967682
December 14, 2005
CLA–2 RR:CR:GC 967682 JAS
CATEGORY: Classification
TARIFF NO.: 7226.99.0000

MR. TIMOTHY SHEPHERD
NISSIN CUSTOMS SERVICE, INC.
101 Mark Street, Suite G
Wood Dale, ILL 60191

RE: "Finemet" Flexible Magnetic Shielding Sheet; NY J86283 Revoked

DEAR MR. SHEPHERD:

In NY J86283, which the Director, National Commodity Specialist Division, Bureau of Customs and Border Protection (CBP), New York, issued to you on behalf of Hitachi Metals America on July 16, 2003, certain alloy steel ribbon to which is laminated polyethyleneterepthalate (PET) was found to be classifiable as other articles of iron or steel, in subheading 7326.90.8587, Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY 86283 was published on October 19, 2005, in the Customs Bulletin, Volume 39, Number 43. Two comments were received in response to this notice, both favoring the proposal but without elaboration.

FACTS:

The merchandise, known as "Finemet" (MS-F), was described in NY J86283 as a thin, flexible magnetic shielding material made of a laminate sandwich consisting of 5 alternating layers: PET (polyethyleneterepthalate) film-adhesive-"Finemet" ribbon-adhesive-PET film. Alloy steel, in ribbon form, is first produced by ejecting molten steel from a crucible onto a rotating chill roll. The molten steel is rapidly quenched, then heat treated, after which adhesive is applied to both sides and PET is applied by a laminating process. Product literature submitted with the ruling request indicates the resulting "Finemet" (MS-F) measures approximately 610 mm x 460 mm x 0.15 mm. This product is designed to eliminate broadband noise in such electrical devices as mobile phones, digital cameras and personal computers by virtue of its magnetic shielding properties.

The HTSUS provisions under consideration are as follows:

7226		Flat-rolled products of other alloy steel, of a width of less than 600 mm:
		Other:
7226.99.00		Other
*	*	* *

7326	Other articles of iron or steel
7326.90	Other:
	Other:
	Other:
7326.90.85	Other

ISSUE:

Whether the merchandise, processed as described, is a product of Chapter 72.

LAW AND ANALYSIS:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Chapter 72, Note 1(k), HTSUS, defines Flat-rolled products, in part, in terms of thickness and width requirements, and includes those products with patterns in relief derived directly from rolling (for example, grooves, ribs, etc.) and those which have been perforated, corrugated or polished, provided that they do not thereby assume the character of articles or products of other headings. The "Finemet" (MS-F) meets these descriptions.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. CBP believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

EN 73.26 indicates the heading covers all iron or steel articles other than those included in the preceding headings of Chapter 73, or covered by Note 1 to Section XV or included in Chapters 82 or 83 or more specifically covered elsewhere in the Nomenclature. In addition, General Explanatory Note (IV)(C) to Chapter 72 indicates that the finished products of that chapter may be subjected to further finishing treatments or converted into other articles. Included are surface treatments or other operations to improve the properties or appearance of the metal, protect it against rusting and corrosion, etc. Except as otherwise provided in the text of certain headings, such treatments do not affect the heading in which the goods are classified. Among these treatments or operations, at General Explanatory Note (IV)(C)(2)(g), is lamination.

The uniting of five alternating layers of PET film and alloy steel ribbon utilizing an adhesive constitutes a lamination. It is apparent that this laminating process is designed to improve the properties of the alloy steel ribbon by better suiting it for use in shielding the magnetic field created by high voltage distribution lines or power distribution equipment, thereby attenuating broadband noise. Therefore, the subject merchandise is provided for as a flat-rolled product of other alloy steel, of heading 7226. By its terms, heading 7326 is eliminated from consideration.

HOLDING:

Under the authority of GRI 1, "Finemet" (MS-F) is provided for in heading 7226. It is classifiable in subheading 7226.99.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). The column 1 rate of duty under this provision is FREE.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov/tata/hts.

EFFECT ON OTHER RULINGS:

NY J86283, dated July 16, 2003, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967683
December 14, 2005
CLA–2 RR:CR:GC 967683 JAS
CATEGORY: Classification
TARIFF NO.: 7210.11.0000, 7210.12.0000, 7210.50.0000, 7210.90.6000, 7210.90.9000

MR. JAYNI LEE
HYOSUNG (AMERICA), INC.
910 Columbia Street
Brea, CA 92821

RE: Polyester/Polyethylene Laminated Steel Sheet; NY J85044 Revoked

DEAR MR. LEE:

In NY J85044, which the Director, National Commodity Specialist Division, Bureau of Customs and Border Protection (CBP), New York, issued to you on June 26, 2003, certain carbon steel sheet to which is laminated a polyester/polyethylene film was found to be classifiable as other articles of iron or steel, of tinplate, in subheading 7326.90.1000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), or as other articles of iron or steel, other, in subheading 7326.90.8587, HTSUSA.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY J85044 was published on October 19, 2005, in the Customs Bulletin, Volume 39, Number 43. Two comments were received in response to this notice, both favoring the proposal but without elaboration.

FACTS:

The merchandise was described in NY J85044 as pre-existing PET/PP film laminated on both sides of a flat-rolled steel substrate of tinplate, tin-free steel or nickel-plated steel. The steel substrate, imported in coils, ranges from 0.15 mm to 1.0 mm in thickness and from 700 mm to 950 mm in width. The product is typically used in the manufacture of aerosol cans, paint cans and food cans.

The HTSUS provisions under consideration are as follows:

7210	Flat-rolled products of iron or nonalloy, of a width of 600 mm or more, clad, plated or coated:
	Plated or coated with tin:
7210.11.00	Of a thickness of 0.5 mm or more
7210.12.00	Of a thickness of less than 0.5 mm
7210.50.00	Plated or coated with chromium oxides or with chromium and chromium oxides
7210.90	Other:
	Other:
7210.90.60	Electrolytically coated or plated with base metal
7210.90.90	Other
*	* * *
7326	Other articles of iron or steel
7326.90	Other:
7326.90.10	Of tinplate
	Other:
	Other:
7326.90.85	Other

ISSUE:

Whether the merchandise, processed as described, is a product of Chapter 72.

LAW AND ANALYSIS:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Chapter 72, Note 1(k), HTSUS, defines Flat-rolled products, in part, in terms of thickness and width requirements, and includes those products with patterns in relief derived directly from rolling (for example, grooves, ribs, etc.) and those which have been perforated, corrugated or polished, provided that they do not thereby assume the character of articles or products of other headings. The "Finemet" (MS-F) meets these descriptions.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. CBP believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Your ruling request, dated May 23, 2003, contained the following product description "PET/PP coated Steel (Polyester/Polyethylene Laminated Steel)" with the further indication that the PET/PP film is laminated to the steel substrate. We note that "PET" is an acronym designating polyethyleneterephthalate, which is a polyester, while "PP" normally designates polypropylene.

EN 73.26 indicates the heading covers all iron or steel articles other than those included in the preceding headings of Chapter 73, or covered by Note 1 to Section XV or included in Chapters 82 or 83 or more specifically covered elsewhere in the Nomenclature. In addition, General Explanatory Note (IV)(C) to Chapter 72 indicates that the finished products of that chapter may be subjected to further finishing treatments or converted into other articles. Included are surface treatments or other operations to improve the properties or appearance of the metal, protect it against rusting and corrosion, etc. Except as otherwise provided in the text of certain headings, such treatments do not affect the heading in which the goods are classified. Among these treatments or operations, at General Explanatory Note (IV)(C)(2)(g), is lamination.

Layers of PET/PP applied to both sides of flat-rolled steel substrates of tinplate, tin-free steel and nickel-plated steel utilizing adhesives constitutes a lamination. It is apparent that this laminating process is designed to improve the properties of the alloy steel substrate by better suiting it for use in food cans and personal hygiene applications such as shaving and deodorant cans. Therefore, the subject merchandise is provided for as a flat-rolled product of nonalloy steel, of heading 7210. By its terms, heading 7326 is eliminated from consideration.

HOLDING:

Under the authority of GRI 1, the PET/PP laminated steel sheet is provided for in heading 7210. The tinplate steel product is classifiable in subheading 7210.11.0000 or in subheading 7210.12.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), depending on thickness. The tin-free steel product is classifiable in subheading 7210.50.0000, HTSUSA, and the nickel-plated steel product is classifiable in subheading 7210.90.6000 or subheading 7210.90.9000, HTSUSA, as appropriate. The column 1 rate of duty under these provisions is FREE.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov/tata/hts.

As you may know, Presidential Proclamation 7741, dated December 4, 2003, effectively terminated the so-called 201 steel safeguard program under which additional duties on merchandise classified in the provisions listed above might have been imposed. Also, you should direct inquiries concerning possible antidumping and/or countervailing duties on this merchandise as instructed in NY J85044.

EFFECT ON OTHER RULINGS:

NY J85044, dated June 26, 2003, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967684
December 14, 2005
CLA–2 RR:CR:GC 967684 JAS
CATEGORY: Classification
TARIFF NO.: 7210.70.3000, 7212.40.5000

MS. DIANE CACHIA
ACTION CUSTOMS EXPEDITERS, INC.
115 Christopher Columbus Drive
Jersey City, NJ 07302

RE: Vinyl Laminated Steel Sheet; NY I80611 Revoked

DEAR MS. CACHIA:

In NY I80611, which the Director, National Commodity Specialist Division, Bureau of Customs and Border Protection (CBP), New York, issued to you on April 19, 2002, on behalf of LG Chemical America Inc., high gloss laminated steel sheet was found to be classifiable as other articles of iron or steel, in subheading 7326.90.8586, Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY I80611 was published on October 19, 2005, in the Customs Bulletin, Volume 39, Number 43. Two comments were received in response to this notice, both favoring the proposal but without elaboration.

FACTS:

The merchandise, described in NY I80611 as high gloss laminated steel sheet, is cut-to-length and ranges from 19.6 inches to 28.6 inches and from 36 inches to 39 inches in width. One side of the steel substrate is painted and the other side is coated with an adhesive layer to which a pre-existing vinyl sheet will be laminated. The vinyl sheet gives the steel the look of stainless steel. These sheets, of nonalloy steel, will be used in the manufacture of refrigerators and dishwashers.

The HTSUS provisions under consideration are as follows:

7210	Flat-rolled products of iron or nonalloy steel, of a width of 600 mm or more, clad, plated or coated:
7210.70	Painted, varnished or coated with plastics:
7210.70.30	Not coated or plated with metal and not clad
*	* * *
7212	Flat-rolled products of iron or nonallloy steel, of a width of less than 600 mm, clad, plated or coated:
7212.40	Painted, varnished or coated with plastics:
7212.40.50	Other
*	* * *
7326	Other articles of iron or steel
7326.90	Other:
	Other:
	Other:
7326.90.85	Other

ISSUE:

Whether the merchandise, processed as described, is a product of Chapter 72.

LAW AND ANALYSIS:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Chapter 72, Note 1(k), HTSUS, defines Flat-rolled products, in part, in terms of thickness and width requirements, and includes those products with patterns in relief derived directly from rolling (for example, grooves, ribs, etc.) and those which have been perforated, corrugated or polished, provided that they do not thereby assume the character of articles or products of other headings. The high gloss laminated steel sheet meets these descriptions.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. CBP believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

EN 73.26 indicates the heading covers all iron or steel articles other than those included in the preceding headings of Chapter 73, or covered by Note 1 to Section XV or included in Chapters 82 or 83 or more specifically covered elsewhere in the Nomenclature. In addition, General Explanatory Note (IV)(C) to Chapter 72 indicates that the finished products of that chapter may be subjected to further finishing treatments or converted into other ar-

ticles. Included are surface treatments or other operations to improve the properties or appearance of the metal, protect it against rusting and corrosion, etc. Except as otherwise provided in the text of certain headings, such treatments do not affect the heading in which the goods are classified. Among these treatments or operations are painting, at General Explanatory Note (IV)(C)(2)(d)(v), and lamination, at General Explanatory Note (IV)(C)(2)(g).

Uniting a pre-existing vinyl sheet with a painted other alloy steel sheet by an adhesive constitutes a lamination. It is apparent that this process, which you state gives the steel the look of stainless steel, is designed to improve the properties or appearance of the metal. The vinyl laminated steel sheet is provided for in heading 7210 or in heading 7212, depending on width. By its terms, heading 7326 is eliminated from consideration.

HOLDING:

Under the authority of GRI 1, the high gloss laminated steel sheets are provided for in headings 7210 or 7212, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). They are classifiable in subheading 7210.70.3000 or in subheading 7212.40.5000, HTSUSA, as appropriate. The column 1 rate of duty under these provisions is FREE.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov/tata/hts.

As you may know, Presidential Proclamation 7741, dated December 4, 2003, effectively terminated the so-called 201 steel safeguard program under which additional duties on merchandise classified in the provisions listed above might have been imposed. Also, you should direct inquiries concerning possible antidumping and/or countervailing duties on this merchandise as instructed in NY I80611.

EFFECT ON OTHER RULINGS:

NY I80611, dated April 19, 2002, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967984
December 14, 2005
CLA–2 RR:CR:GC 967984 JAS
CATEGORY: Classification
TARIFF NO.: 7220

MR. H. YAMADA
SUMITOMO CORPORATION OF AMERICA
LOGISTICS AND INSURANCE DEPARTMENT
600 Third Avenue
New York, NY 10016–2001

RE: Vibration Damping Material; NY H84957 Revoked

DEAR MR. YAMADA:

In NY H84957, which the Director, National Commodity Specialist Division, Bureau of Customs and Border Protection (CBP), New York, issued to you on August 30, 2001, a vibration damping polymer was found to be classifiable as other articles of iron or steel, in subheading 7326.90.8586, Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of rulings on substantially identical merchandise was published on October 19, 2005, in the Customs Bulletin, Volume 39, Number 43. Two comments were received in response to this notice, both favoring the proposal but without elaboration.

FACTS:

The merchandise was described in NY H84957 as a laminate consisting of a stainless steel layer, a damping acrylic polymer layer and a silicone-free release polyester liner. It measures typically about ½ inch in width and is imported in coiled form. After importation, the material will be processed for application in hard disc drives where its purpose is to dampen hard disc suspension vibration during high speed rotation. The stainless steel layer predominates by weight over the acrylic polymer, but the polymer accounts for the major portion of the material cost.

ISSUE:

Whether the vibration damping material, processed as described, is a product of Chapter 72.

LAW AND ANALYSIS:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Chapter 72, Note 1(k), HTSUS, defines Flat-rolled products, in part, as rolled products of solid rectangular (other than square) cross section, which do not conform to the definition [of Semifinished products at (ij) above] in

the form of coils of successively superimposed layers. The vibration damping material meets these descriptions.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. CBP believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Heading 7220, HTSUS, provides for flat-rolled products of stainless steel, of a width of less than 600 mm. Numerous subheadings within this heading delineate the product not further worked than hot-rolled and not further worked than cold-rolled (cold-reduced). These subheadings are further delineated by width and thickness and by percentage of alloy content.

EN 73.26 indicates the heading covers all iron or steel articles other than those included in the preceding headings of Chapter 73, or covered by Note 1 to Section XV or included in Chapters 82 or 83 or more specifically covered elsewhere in the Nomenclature. In addition, General Explanatory Note (IV)(C) to Chapter 72 indicates that the finished products of that chapter may be subjected to further finishing treatments or converted into other articles. Included are surface treatments or other operations to improve the properties or appearance of the metal, protect it against rusting and corrosion, etc. Except as otherwise provided in the text of certain headings, such treatments do not affect the heading in which the goods are classified. Among these treatments or operations are lamination, at General Explanatory Note (IV)(C)(2)(g).

The process of uniting a stainless steel layer with a damping acrylic polymer layer and a silicone free release polyester liner constitutes a lamination. It is apparent that this process is designed to improve the properties or appearance of the metal so as to dedicate it as a vibration damping material. This material, as described, is provided for in subheadings of heading 7220, HTSUS, as appropriate. By its terms, heading 7326 is eliminated from consideration.

HOLDING:

Under the authority of GRI 1, the vibration damping material, as described, is provided for in headings 7220, HTSUS. It is classifiable in subheadings of that heading, as appropriate. The column 1 rate of duty under all of these provisions is FREE.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov/tata/hts.

EFFECT ON OTHER RULINGS:

NY H84957, dated August 30, 2001, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

GENERAL NOTICE OF MODIFICATION AND REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN SOCKS AND BOOTIES WITH ATTACHED RATTLES

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security

ACTION: Notice of revocation of four ruling letters, modification of one ruling letter and revocation of treatment relating to the tariff classification of certain socks and booties with attached rattles.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) is revoking four ruling letters, modifying one ruling letter and revoking treatment relating to the tariff classification of certain socks and booties with attached rattles. Similarly, CBP is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of proposed action was published in the October 19, 2005, CUSTOMS BULLETIN, Volume 39, Number 43. One comment was received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 5, 2006.

FOR FURTHER INFORMATION CONTACT: Teresa Frazier, Tariff Classification and Marking Branch, at (202) 572–8821.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer

of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, notice proposing to modify New York Ruling Letter (NY) H86160, dated January 3, 2002, and revoke Port Decision (PD) D88311, dated March 3, 1999; NY F86031, dated May 3, 2000; NY A81415, dated April 5, 1996; and NY H86887, dated January 18, 2002, was published in the October 19, 2005, CUSTOMS BULLETIN, Volume 39, Number 43. One comment was received in response to this notice. In their response, the commenter raises a claim for treatment and seeks continued classification within heading 9503, HTSUS, on the basis that the merchandise described as "imported sock rattles that consist of a knit infant sock to which is attached a small toy rattle" is classifiable as "other toys" because their merchandise provides amusement by serving principally as a developmental toy for an infant, not to cover a baby's feet. We have considered the commenter's claim of treatment and have followed the procedures set forth in 19 C.F.R. §177.12 and 19 U.S.C. § 1625(c) with respect to treatment previously accorded to substantially similar merchandise. We note that in their response, although the commenter raises a claim of treatment, the commenter does not provide any evidence or documentation to substantiate their claim. Therefore, as their claim is unperfected, we do not accept their claim of treatment. Additionally, while we reject their claim of treatment on the basis of an unsubstantiated claim, this notice serves as a revocation of any treatment that may exist with respect to the merchandise subject to the rulings or any substantially similar merchandise. We recognize the commenter's merchandise to be substantially similar merchandise.

As stated in the proposed notice, the modification and revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the five identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, Customs and Border Protection is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a

ruling issued to a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved with substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY H86160, dated January 3, 2002, CBP classified merchandise identified as "Whoozit Booties" in subheading 9503.90.0080, HTSUSA, which provides, in pertinent part for, other toys. In PD D88311, dated March 3, 1999, CBP classified two products identified as "Foot Rattles" in subheading 9503.90.0045, HTSUSA, which provided, in pertinent part, for other toys. In NY F86031, dated May 3, 2000, CBP classified merchandise identified as "Kids II Foot Rattles" in subheading 9503.41.0010, HTSUSA, which provided, in pertinent part for, stuffed toys representing animals or non-human creatures. In NY A81415, dated April 5, 1996, CBP classified an article described as a "Foot Rattle" in subheading 9503.90.0030, HTSUSA, which provided, in pertinent part, for other toys. In NY H86887, dated January 18, 2002, CBP classified an item identified as a "Duck Rattle Sock/Foot Jingle" in subheading 9503.90.0080, HTSUSA, which provides, in pertinent part for, other toys. Upon review of these rulings, CBP has determined that the identified merchandise was classified incorrectly. The merchandise should be classified as follows:

- In NY H86160, style 200840, the pair of "Whoozit Booties", should be classified in subheading 6209.30.3040, HTSUSA, which provides for "Babies' garments and clothing accessories: Of synthetic fibers: Other . . . Other."
- In PD D88311, the two styles of "Foot Rattles", identified as styles 2209 and 2409, should be classified in subheading 6209.30.3040, HTSUSA,
- In NY F86031 (the "Kids II Foot Rattles"), NY A81415 (the "Foot Rattle"), and NY H86887 (the "Duck Rattle Sock/Foot Jingle"), the goods should be classified in heading 6115, which covers, among other goods, socks and other hosiery and footwear without applied textile soles, knitted or crocheted. When each importer provides the fiber content of these textile articles, the eight-digit level classification and quota category number can be determined.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is modifying NY H86160 and revoking PD D88311; NY F86031; NY A81415 and NY H86887, and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letters (HQ) 967729, HQ 967731, HQ

967730, HQ 967732 and HQ 967733, set forth as Attachments A through E to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

DATED: December 12, 2005

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967729
December 12, 2005
CLA–2 RR:CTF:TCM 967729 TMF
CATEGORY: Classification
TARIFF NO.: 6209.30.3040

MR. JOHN MATTSON
NORTH STAR WORLD TRADE SERVICES, INC.
980 Lone Oak Road
Suite 160
Egan, Minnesota 55121

Re: Modification of New York Ruling Letter (NY) H86160, dated January 3, 2002; Classification of Whoozit Booties

DEAR MR. MARLOW:

In New York Ruling Letter (NY) H86160, issued to you January 3, 2002, this office classified merchandise identified as "Whoozit Booties," item number 200840, in subheading 9503.90.0080, HTSUSA, which provides, in pertinent part, for other toys. We have reviewed NY H86160, and with respect to the "Whoozit Booties," find it to be in error. Therefore, this ruling modifies NY H86160.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice proposing to modify New York Ruling Letter (NY) H86160, dated January 3, 2002, was published in the October 19, 2005, CUSTOMS BULLETIN, Volume 39, Number 43. One comment was received in response to this notice.

FACTS:

NY H86160 describes the subject Whoozit Booties as follows:

> Item 200840, Whoozit Booties are made of either 100% man-made fibers or 65% polyester/35% cotton fibers. Both the uppers and soles are bright[,] multicolored shinny [sic] textile. At the tip of the booties, which curves upward, is the head of a creature with a broad smile and large red nose. The head encloses a rattle. The booties serve as foot rattles. The face of the creature will be pointed toward the baby's head and will rattle when the child moves his or her legs.

ISSUE:

What is the classification of the subject merchandise?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. When goods cannot be classified solely on the basis of GRI 1 and if the terms of the headings and any relative section or chapter notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Subheading 9503.90, HTSUSA, covers, in pertinent part, other toys. Chapter 95, HTSUSA, which provides essentially for toys, games and sports equipment, requires that an article classifiable therein must be designed principally to amuse. The subject merchandise is not so designed. The subject booties are designed to be worn as apparel. The amusement aspect of the merchandise is secondary to its principal function, which is to cover the feet. The goods are more accurately described as booties than as other toys, and as booties with rattles, rather than rattles with booties. Thus, they are not properly classified in subheading 9503.90.

In this case, the subject booties are made of either 100 percent man-made fibers or a blend of 65 percent polyester/35 percent cotton fibers, with uppers and soles made of bright, multicolored shiny textile. The facts do not state whether the booties have an applied textile sole, nor whether the fabric is woven or knitted. We presume that the subject booties are woven and that they lack an applied sole. Thus, we find the merchandise is classifiable as babies garments in chapter 62, specifically in subheading 6209.30.3040, which provides for "Babies' garments and clothing accessories: Of synthetic fibers: Other . . . Other."

HOLDING:

The subject "Whoozit Booties," item number 200840, are classifiable in subheading 6209.30.3040, which provides for "Babies' garments and clothing accessories: Of synthetic fibers: Other . . . Other." The general column one duty rate is 16 percent *ad valorem*, and the textile quota category is 239.

Quota/visa requirements are no longer applicable for merchandise which is the product of a World Trade Organization (WTO) member countries. The textile category number above applies to merchandise produced in non-WTO member-countries. Quota and visa requirements are the result of interna-

tional agreements that are subject to frequent renegotiations and changes. To obtain the most current information on quota and visa requirements applicable to this merchandise, we suggest you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas", which is available on our web site at www.cbp.gov. For current information regarding possible textile safeguard actions and related issues, we refer you to the web site at the Office of Textiles and Apparel of the Department of Commerce at otexa.ita.doc.gov.

EFFECT ON OTHER RULINGS:

NY H86160, dated January 3, 2002 is hereby modified.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Trade and Facilitation Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967731
December 12, 2005
CLA–2 RR:CTF:TCM 967731 TMF
CATEGORY: Classification
TARIFF NO.: 6111.30.5050

DONNA VAN DEN BROEKE
KAT IMPORT BROKERS, INC.
514 Eccles Avenue South
San Francisco, CA 94080

Re: Revocation of Port Decision (PD) D88311, dated March 3, 1999; Classification of two styles of "Foot Rattles"

DEAR MS. VAN DEN BROEKE:

In Port Decision (PD) D88311, issued to you March 3, 1999, two styles of merchandise identified as "Foot Rattles" were classified in subheading 9503.90.0045, HTSUSA, which provided, in pertinent part, for other toys. We have reviewed PD D88311 and find it to be in error. Therefore, this ruling revokes PD D88311.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice proposing to revoke Port Decision (PD) D88311, dated March 3, 1999, was published in the October 19, 2005, CUSTOMS BULLETIN, Volume 39, Number 43. One comment was received in response to this notice.

FACTS:

PD D88311 describes the two styles of Foot Rattles, identified as product numbers 2209 and 2409 as follows:

The products are rattles attached to infant's leg socks made of 65% polyester and 35% cotton. The rattles are in a flat textile enclosure sewn to the bottom part of the sock. The attachments have either "Winnie the Pooh" or a "Sesame Street" character screen printed on the front side of the rattle enclosure. When placed on the infant's foot the movement of the leg will cause the rattle to make noise.

ISSUE:

What is the classification of the subject merchandise?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. When goods cannot be classified solely on the basis of GRI 1 and if the terms of the headings and any relative section or chapter notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Subheading 9503.90, HTSUSA, covers, in pertinent part, other toys. Chapter 95, HTSUSA, which provides essentially for toys, games and sports equipment, requires that an article classifiable therein must be designed principally to amuse. The subject merchandise is not so designed. The subject booties are designed to be worn as apparel. The amusement aspect of the merchandise is secondary to its principal function, which is to cover the feet. The goods are more accurately described as booties than as other toys, and as booties with rattles, rather than rattles with booties. Thus, they are not properly classified in subheading 9503.90.

In this case, the material comprising the subject socks is made of a blend of 65 percent polyester/35 percent cotton fibers. The facts do not state whether the socks have an applied sole, nor whether the material is woven or knitted. We presume that the subject socks are knitted and that they lack an applied sole. Therefore, we find the merchandise to be classifiable as babies garments in chapter 61, specifically subheading 6111.30.5050, HTSUSA, which provides for "Babies' garments and clothing accessories: knitted or crocheted: Of synthetic fibers: Other . . . Other: Babies' socks and booties."

HOLDING:

The two styles of "Foot Rattles", identified as styles 2209 and 2409, are classifiable in subheading 6111.30.5050, HTSUSA, which provides for "Babies' garments and clothing accessories: knitted or crocheted: Of synthetic fibers: Other . . . Other: Babies' socks and booties." The general column one duty rate is 16 percent. The textile quota category is 239.

Quota/visa requirements are no longer applicable for merchandise which is the product of a World Trade Organization (WTO) member countries. The textile category number above applies to merchandise produced in non-WTO member-countries. Quota and visa requirements are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information on quota and visa requirements ap-

plicable to this merchandise, we suggest you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas", which is available on our web site at www.cbp.gov. For current information regarding possible textile safeguard actions and related issues, we refer you to the web site at the Office of Textiles and Apparel of the Department of Commerce at otexa.ita.doc.gov.

EFFECT ON OTHER RULINGS:

PD D88311, dated March 3, 1999, is hereby revoked.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Trade and Facilitation Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967730
December 12, 2005
CLA–2 RR:CTF:TCM 967730 TMF
CATEGORY: Classification
TARIFF NO.: 6111

M. LANE
140 Route 17 North, Suite 269
Paramus, NJ 07652

Re: Revocation of New York Ruling Letter (NY) F86031, dated May 3, 2000; Classification of "Kids II Foot Rattles"

DEAR MR. LANE:

In New York Ruling Letter (NY) F86031, issued to you May 3, 2000, this office classified merchandise identified as "Kids II Foot Rattles" in subheading 9503.41.0010, HTSUSA, which provides, in pertinent part for stuffed toys representing animals or non-human creatures. We have reviewed NY F86031 and with respect to the "Kids II Foot Rattles," find it to be in error. Therefore, this ruling revokes NY F86031.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice proposing to revoke New York Ruling Letter (NY) F86031, dated May 3, 2000, was published in the October 19, 2005, CUSTOMS BULLETIN, Volume 39, Number 43. One comment was received in response to this notice.

FACTS:

NY F86031 describes the subject "Kids II Foot Rattles" as follows:

> The item will be packaged on a cardboard insert in a clear plastic bag. The cardboard insert describes the article as "Kids II Foot Rattles". The article is a pair of textile socks with a miniature stuffed dog perma-

nently attached to each sock. Each stuffed toy dog has a rattle sewn into it that rattles when the baby wearing the socks kicks his/her feet.

ISSUE:

What is the classification of the subject merchandise?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. When goods cannot be classified solely on the basis of GRI 1 and if the terms of the headings and any relative section or chapter notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Subheading 9503.41, HTSUSA, covers, in pertinent part, stuffed toys representing animals or non-human creatures. Chapter 95, HTSUSA, which provides essentially for toys, games and sports equipment, requires that an article classifiable therein must be designed principally to amuse. The subject merchandise is not so designed. The subject socks are designed to be worn as apparel. The amusement aspect of the merchandise is secondary to its principal function, which is to cover the feet. The goods are more accurately described as socks than as stuffed toys representing animals or non-human creatures, and as socks with rattles, rather than rattles with socks. Thus, they are not properly classified in subheading 9503.41.

In this case, the facts of NY F86031 simply state that the merchandise is made of "textile", without specification as to the material's fiber content, whether they are woven or knitted, or possess an applied sole. Therefore, we presume that the socks do not have an applied sole, that they are knitted, and we find that they are classifiable in chapter 61, specifically under heading 6111.

Therefore, in light of the above analysis, the merchandise is classifiable in chapter 61, specifically under heading 6111. If the fiber content is determined to be of cotton, the subject socks are classifiable in subheading 6111.20.6050; if of a synthetic fiber, they are classifiable in subheading 6111.30.5050; or if of an artificial fiber, they are classifiable in subheading 6111.90.5050, HTSUSA. Once this information is provided by the importer, classification at the eight-digit level can be determined.

HOLDING:

The subject "Kids II Foot Rattles" are classifiable in heading 6111, which covers babies' garments and clothing accessories, knitted or crocheted. When the importer provides the fiber content of the textile material comprising the article, the eight-digit level classification and quota category number can be determined.

Quota/visa requirements are no longer applicable for merchandise which is the product of a World Trade Organization (WTO) member countries. The textile category number applies to merchandise produced in non-WTO member-countries. Quota and visa requirements are the result of international agreements that are subject to frequent renegotiations and changes.

To obtain the most current information on quota and visa requirements applicable to this merchandise, we suggest you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas", which is available on our web site at www.cbp.gov. For current information regarding possible textile safeguard actions and related issues, we refer you to the web site at the Office of Textiles and Apparel of the Department of Commerce at otexa.ita.doc.gov.

EFFECT ON OTHER RULINGS:

NY F86031, dated May 3, 2000 is hereby revoked.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin.*

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Trade and Facilitation Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967732
December 12, 2005
CLA–2 RR:CTF:TCM 967732 TMF
CATEGORY: Classification
TARIFF NO.: 6111

MR. ROBERT M. SHREVE
MARE-SHREVE & ASSOCIATES, INC.
615 Second Avenue
Seattle, Washington 98104

Re: Revocation of New York Ruling Letter (NY) A81415, dated April 5, 1996; Classification of a "Foot Rattle"

DEAR MR. SHREVE:

In New York Ruling Letter (NY) A81415, issued to you April 5, 1996, merchandise identified as a "Foot Rattle" was classified in subheading 9503.90.0030, HTSUSA, which essentially provided for other toys. We have reviewed NY A81415 and find it to be in error. Therefore, this ruling revokes NY A81415.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice proposing to revoke New York Ruling Letter (NY) A81415, dated April 5, 1996, was published in the October 19, 2005, CUSTOMS BULLETIN, Volume 39, Number 43. One comment was received in response to this notice.

FACTS:

NY A81415 describes the subject "Foot Rattle" as follows:

> The item consists of an infant sized sock with a rattle sewn to the instep area. The rattle itself is concealed within a lightly padded textile form

that is printed with the face of an animal. The article provides a stimulating and entertaining form of amusement to an infant.

ISSUE:

What is the classification of the subject merchandise?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. When goods cannot be classified solely on the basis of GRI 1 and if the terms of the headings and any relative section or chapter notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Subheading 9503.90, HTSUSA, covers, in pertinent part, other toys. Chapter 95, HTSUSA, which provides essentially for toys, games and sports equipment, requires that an article classifiable therein must be designed principally to amuse. The subject merchandise is not so designed. The subject socks are designed to be worn as apparel. The amusement aspect of the merchandise is secondary to its principal function, which is to cover the feet. The goods are more accurately described as socks than as other toys, and as socks with rattles, rather than rattles with socks. Thus, they are not properly classified in subheading 9503.90.

In this case, the facts of NY A81415 do not indicate whether the subject socks are woven or knitted, whether they have an applied sole, nor do they provide any information about fiber content. We presume that they are knitted, that they do not have an applied sole, and find that they are classifiable in chapter 61, specifically heading 6111. If the fiber content is determined to be of cotton, the subject socks are classifiable in subheading 6111.20.6050; if of a synthetic fiber, they are classifiable in subheading 6111.30.5050; or if of an artificial fiber, they are classifiable in subheading 6111.90.5050, HTSUSA. Once this information is provided by the importer, classification at the eight-digit level can be determined.

HOLDING:

The subject "Foot Rattle" is classifiable in heading 6111, which covers babies' garments and clothing accessories, knitted or crocheted. When the importer provides the fiber content of the textile material comprising the article, the eight-digit level classification and quota category number can be determined.

Quota/visa requirements are no longer applicable for merchandise which is the product of a World Trade Organization (WTO) member countries. The textile category number applies to merchandise produced in non-WTO member-countries. Quota and visa requirements are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information on quota and visa requirements applicable to this merchandise, we suggest you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas", which is available on our web site at www.cbp.gov. For current information regarding possible tex-

tile safeguard actions and related issues, we refer you to the web site at the Office of Textiles and Apparel of the Department of Commerce at otexa.ita.doc.gov.

EFFECT ON OTHER RULINGS:

NY A81415, dated April 5, 1996 is hereby revoked.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Trade and Facilitation Division.

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967733
December 12, 2005
CLA–2 RR:CTF:TCM 967733 TMF
CATEGORY: Classification
TARIFF NO.: 6111

MS. GENEVIEVE M. RAFTER KEDDY
J.M. CUSTOMS BROKERS, INC.
147–55 175th Street
Jamaica, NY 11734

Re: Revocation of New York Ruling Letter (NY) H86887, dated January 18, 2002; Classification of a "Duck Rattle Sock/Foot Jingle"

DEAR MS. RAFTER KEDDY:

In New York Ruling Letter (NY) H86887, issued to you January 18, 2002, merchandise identified as "Duck Rattle Sock/Foot Jingle" was classified in subheading 9503.90.0080, HTSUSA, which essentially provides for other toys. We have reviewed NY H86887 and find it to be in error. Therefore, this ruling revokes NY H86887.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice proposing to revoke New York Ruling Letter (NY) H86887, dated January 18, 2002, was published in the October 19, 2005, CUSTOMS BULLETIN, Volume 39, Number 43. One comment was received in response to this notice.

FACTS:

NY H86887 describes the subject article as follows:

> Duck Rattle Sock/Foot Jingle, consists of an infant sized sock with a rattle sewn to the front top of the sock. The rattle itself is concealed within a lightly padded cotton duck. The article provides a stimulating and entertaining form of amusement to an infant.

ISSUE:

What is the classification of the subject merchandise?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. When goods cannot be classified solely on the basis of GRI 1 and if the terms of the headings and any relative section or chapter notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Subheading 9503.90, HTSUSA, covers, in pertinent part, other toys. Chapter 95, HTSUSA, which provides essentially for toys, games and sports equipment, requires that an article classifiable therein must be designed principally to amuse. The subject merchandise is not so designed. The subject socks are designed to be worn as apparel. The amusement aspect of the merchandise is secondary to its principal function, which is to cover the feet. The goods are more accurately described as socks than as other toys, and as socks with rattles, rather than rattles with socks. Thus, they are not properly classified in subheading 9503.90.

In this case, the facts of NY H86887 do not indicate whether the subject socks are woven or knitted, whether they have an applied sole, nor do they provide any information about fiber content. We presume that they are knitted, that they do not have applied soles, and find that they are classifiable in chapter 61, specifically heading 6111. If the fiber content is determined to be of cotton, the subject socks are classifiable in subheading 6111.20.6050; if of a synthetic fiber, they are classifiable in subheading 6111.30.5050; or if of an artificial fiber, they are classifiable in subheading 6111.90.5050, HTSUSA. Once this information is provided by the importer, classification at the eight-digit level can be determined.

HOLDING:

The subject "Duck Rattle Sock/Foot Jingle" is classifiable in heading 6111, which covers babies' garments and clothing accessories, knitted or crocheted. When the importer provides the fiber content of the textile article, the eight-digit level classification and quota category number can be determined.

Quota/visa requirements are no longer applicable for merchandise which is the product of a World Trade Organization (WTO) member countries. The textile category number applies to merchandise produced in non-WTO member-countries. Quota and visa requirements are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information on quota and visa requirements applicable to this merchandise, we suggest you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas", which is available on our web site at www.cbp.gov. For current information regarding possible textile safeguard actions and related issues, we refer you to the web site at the Office of Textiles and Apparel of the Department of Commerce at otexa.ita.doc.gov.

EFFECT ON OTHER RULINGS:

NY H86887, dated January 18, 2002 is hereby revoked

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Trade and Facilitation Division.

19 CFR PART 177

PROPOSED MODIFICATION OF ONE RULING LETTER, REVOCATION OF TWO RULING LETTERS, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN BRAIDS IN THE PIECE

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed modification of a tariff classification ruling letter, revocation of two ruling letters, and revocation of treatment relating to the classification of certain braids in the piece.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify one ruling letter and revoke two ruling letters relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain braids in the piece. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before February 3, 2006.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark of the Trade and Commercial Regulations Branch at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Brian Barulich, Tariff Classification and Marking Branch, at (202) 572–8883.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to modify one ruling letter and revoke two ruling letters relating to the tariff classification of certain braids in the piece. Although in this notice CBP is specifically referring to the modification of New York Ruling Letter (NY) H87352, dated February 19, 2002 (Attachment A) and the revocation of NY J82797, dated April 10, 2003 (Attachment B) and NY J82793, dated April 9, 2003 (Attachment C), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved with substantially identical transactions should advise CBP during this notice

period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY H87352, NY J82797, and J82793, CBP classified several articles of braided construction incorporating metallic strip in heading 5605, HTSUS, which provides for: "Metalized yarn, whether or not gimped, being textile yarn, or strip of the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal." Based on our review of each ruling, the HTSUS, and the Explanatory Notes for Heading 5605 and Heading 5808, we now believe that these articles are classified in heading 5808, which provides for: "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to modify NY H87352, revoke NY J82797 and NY J82793, and revoke any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analyses set forth in proposed Headquarters Ruling Letter (HQ) 967828 (Attachment D), HQ 967829 (Attachment E), and HQ 967830 (Attachment F), respectively. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

DATED: December 16, 2005

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY H87352
February 19, 2002
CLA–2–56:RR:NC:N3:351 H87352
CATEGORY: Classification
TARIFF NO.: 5605.00.1000, 5605.00.9000, 5808.10.7000, 5808.10.9000

JANET L. TELLES
GLOBAL COMPLIANCE MANAGER
SMITH INTERNATIONAL ENTERPRISES, LTD.
20600 Chagrin Blvd., Suite 200
Shaker Heights, Ohio 44122

RE: The tariff classification of twine, yarns, and trimmings from Hong Kong.

DEAR MS. TELLES:

In your letter dated January 30, 2002, you requested a tariff classification ruling.

You submitted three groups of samples and state that they will be imported in rolls of 150 yards.

You have stated that certain of the items which are the subject of this ruling contain a percentage by weight of metalized yarns. Please note that a yarn that contains any amount of metal is regarded in its entirety as "metalized yarn" for tariff purposes. Thus, the determination of which textile material predominates by weight is based not on the actual weight of metal, but on the actual weight of all yarns that contain metal. We have not verified the fiber content through laboratory testing, and will assume that your stated fiber content is correct. Upon importation, however, if the fiber content is found by laboratory testing or other means to be different from that stated in this ruling, then this ruling does not apply.

In all cases where metallic strips are used, the strips meet the tariff definition for textile.

In group one are KS3, KS6, KS7, and KS9. They are described as polypropylene and metallic. KS3 and KS6 are braided yarns. KS3 has four polypropylene multifilament strands braided with two metallic strips. KS6 has four multifilament strands of polypropylene braided with four multi-ply strands of multifilament yarn gimped (that is, wrapped) with metallic strips. KS7 is a 3.5mm-wide flat braid with two braid cores braided together with nine gimped yarns; three of these yarns are metallic. KS9 is a 7mm-wide flat braid of three sets of three gimped yarns each; six of the yarns are metallic.

The second group includes KS1, 2, and 5. KS1 is a three-ply twisted yarn; each ply is approximately 15 multifilament strands of yarn gimped with metalized textile strip. KS2 is a braided yarn composed of multiple multifilament strands of textile and metallic textile strip. KS5 is a flat braided multifilament yarn gimped with metallic strip.

The third group is said to be of polypropylene. 146YP is a three-ply twisted cord measuring approximately 4mm in diameter. KS4 is a 2.5mm-wide flat braid with a slightly thicker yarn incorporated along both edges

fashioned to give a slight picot edge. KS8 is a 4mm-wide flat braid similar to KS7 with a double core, but the braiding yarns are plain (not gimped), and there are no metallic yarns.

The applicable subheading for KS2 and 3 will be 5605.00.1000, Harmonized Tariff Schedule of the United States (HTS), which provides for metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal: metal coated or metal laminated man-made filament or strip or the like, ungimped, and untwisted or with twist of less than 5 turns per meter. The duty rate will be nine percent ad valorem.

The applicable subheading for KS1, 5, and 6 will be 5605.00.9000, HTS, which provides for metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal; other.

The applicable subheading for KS4 and 8 will be 5808.10.7000, HTS, which provides for braids in the piece; other; of cotton or man-made fibers. The duty rate will be 7.6 percent ad valorem.

The applicable subheading for KS7 and 9 will be 5808.10.9000, HTS, which provides for braids in the piece; other; other. The rate of duty will be 5 percent ad valorem.

The applicable subheading for 146YP will be 5607.49.1500, HTS, which provides for twine, cordage, ropes and cables . . . of polyethylene or polypropylene, other, other, not braided or plaited, measuring less than 4.8-mm in diameter. The duty rate will be 7.2 percent ad valorem.

Those items classifiable in subheading 5605.00.9000, HTS, (that is, KS1, 5, and 6) fall within textile category designation 201. Based upon international textile trade agreements products of Hong Kong are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the U.S. Customs Service Textile Status Report, an internal issuance of the U.S. Customs Service, which is available at the Customs Web site at www.customs.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

Your inquiry does not provide enough information for us to give a classification ruling on P2, WF#6, WF#5, UN#1 (both Pastel and Bright), and Multi Color Block. Your request for a classification ruling for P2, WF#6, WF#5, and UN#1 should include the weight of each with the support (spool, card, reel, etc.) in the 150-yard rolls on which you say they will be imported. For Multi Color Block we need to know on what type of machine it was made, whether it is a warp or weft knit, and the weight of the 150-yd. roll without the support.

When this information is available, you may wish to consider resubmission of your request. We are retaining the samples for our files. If you decide to resubmit your request, please include a copy of this letter.

In the future, please limit your requests to five items.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 646–733–3102.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY J82797
April 10, 2003
CLA–2–56:RR:NC:N3:351 J82797
CATEGORY: Classification
TARIFF NO.: 5605.00.9000

MS. YOLANDA S. MASSEY
IMPORT MANAGER
MICHAELS
8000 Bent Brush Drive
Irving, TX 75063

RE: The tariff classification of decorative metalized yarn from Taiwan.

DEAR MS. MASSEY:

In your letter dated March 21, 2003, you requested a ruling on tariff classification.

You submitted three samples of your Vendor Style # MXT-12209, designated A-C. We shall first discuss A and B.

Sample A is described as 100% polyester. It is composed of six gimped strands (a multifilament core wrapped by a strip) mixed with numerous strips. They are all braided together. It is flat and measures 1/8″ across.

Sample B is a braided nylon core sheathed in braided textile strip. It measures 1/16″ in diameter.

The metallic strip in each is considered textile for tariff purposes. Please note that a yarn that contains any amount of metal is regarded in its entirety as "metalized yarn" for tariff purposes. Thus, the determination of which textile material predominates by weight is based not on the actual weight of metal, but on the actual weight of all yarns that contain metal. MXT-12209 A and B are considered to be 100% metallic.

Your Import Quote Sheet shows the classification of A and B as heading 5808, Harmonized Tariff Schedule of the United States Annotated (HTSUSA) which provides for "braids in the piece." However, Table I of the Explanatory Notes to Section XI, entitled "Classification of yarns, twine, cordage, rope and cables of textile material," states that metalized yarns are classified in heading 5605 "in all cases."

The applicable subheading for this product will be 5605.00.9000, HTS, which provides for metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in

the form of thread, strip or powder or covered with metal; other. The general rate of duty will be 13.4 percent ad valorem.

This product falls within textile category designation 201. Based upon international textile trade agreements products of Taiwan are currently subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the U.S. Customs Service Textile Status Report, an internal issuance that is available at the Customs Web site at www.customs.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

Your inquiry does not provide enough information for us to give a classification ruling on sample C. Your request for a classification ruling must include the type of machine it is made on. When this information is available, you may wish to consider resubmission of your request.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R.).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 646–733–3102.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY J82793
April 9, 2003
CLA–2–56:RR:NC:N3:351 J82793
CATEGORY: Classification
TARIFF NO.: 5605.00.9000

MS. YOLANDA S. MASSEY
IMPORT MANAGER
MICHAELS
8000 Bent Brush Drive
Irving, TX 75063

RE: The tariff classification of decorative metalized yarns from Taiwan.

DEAR MS. MASSEY:

In your letter dated March 21, 2003, you requested a ruling on tariff classification.

You submitted three samples of your Vendor Style # MXT-12210, designated A and B. They are the type of fancy cord used to wrap gifts and for

similar uses. They are identical except for color. Both are composed of a braided polyester core sheathed in a braid composed of six gimped strands (a multifilament core wrapped by a metallic strip) mixed with numerous metallic strips, all braided together.

Sample A is gold, green, and red; sample B is silver and blue. They measure 1/8" in diameter.

The metallic strip in each is considered textile for tariff purposes. Please note that a yarn that contains any amount of metal is regarded in its entirety as "metalized yarn" for tariff purposes. Thus, the determination of which textile material predominates by weight is based not on the actual weight of metal, but on the actual weight of all yarns that contain metal. MXT-12210 A and B are considered to be 100% metallic.

Your Import Quote Sheet shows the classification of A and B as heading 5607, Harmonized Tariff Schedule of the United States Annotated (HTSUSA) which provides for twine, cordage, ropes and cables. However, Table I of the Explanatory Notes to Section XI, entitled "Classification of yarns, twine, cordage, rope and cables of textile material," states that metalized yarns are classified in heading 5605 "in all cases."

The applicable subheading for this product will be 5605.00.9000, HTS, which provides for metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal; other. The general rate of duty will be 13.4 percent ad valorem.

This product falls within textile category designation 201. Based upon international textile trade agreements products of Taiwan are currently subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the U.S. Customs Service Textile Status Report, an internal issuance which is available at the Customs Web site at www.customs.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R.).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 646–733–3102.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967828
CLA–2 RR:CR:TE 967828 BtB
CATEGORY: Classification
TARIFF NO.: 5808.10.9000

MS. YOLANDA S. MASSEY
IMPORT MANAGER
MICHAELS STORES, INC.
8000 Bent Branch Dr.
Irving, Texas 75063

Re: Classification of braid in the piece; NY J82797 revoked

DEAR MS. MASSEY:

On April 10, 2003, U.S. Customs and Border Protection (CBP) issued New York Ruling Letter (NY) J82797 to Michaels Stores, Inc. ("Michaels"). In NY J82797, CBP classified two articles identified as Vendor Style # MXT-12209, Sample A and Sample B, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Upon review of that ruling, we have found that the classifications provided for these articles are incorrect. This ruling, Headquarters Ruling Letter (HQ) 967828, hereby revokes NY J82797 and sets forth the correct classification of those samples.

FACTS:

In NY J82797, Sample A and Sample B were described as follows:

> Sample A is described as 100% polyester. It is composed of six gimped strands (a multifilament core wrapped by a strip) mixed with numerous strips. They are all braided together. It is flat and measures 1/8" across.
>
> Sample B is a braided nylon core sheathed in braided textile strip. It measures 1/16" in diameter.

The strip in Sample A and Sample B is metallic. Both articles are made in Taiwan. In NY J82797, CBP classified Sample A and Sample B under subheading 5605.00.9000, HTSUSA, which provides for "Metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal: Other."

ISSUE:

Whether Sample A and Sample B were properly classified in heading 5605, HTSUSA, as metalized yarns or are they classified as braid in the piece in heading 5808, HTSUSA.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied, in order.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Heading 5605, HTSUSA, provides for "Metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal." The ENs to heading 5605 state that, among other articles, the heading covers:

> (1) **Yarn consisting of any textile material (including monofilament, strip and the like and paper yarn) combined with metal thread or strip**, whether obtained by a process of twisting, cabling or by gimping, whatever the proportion of the metal present. . . .

Braided constructions are not provided for in the terms of heading 5605 or mentioned in the ENs to that heading.

Heading 5808, HTSUSA, however, does provide for braided constructions. In its entirety, the heading provides for: "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles." The ENs to heading 5808 state that the products classified in the heading, among other articles, include:

> (1) **Flat or tubular braids.**
>
> These are obtained by interlacing diagonally yarns, or the monofilament, strip and the like of Chapter 54.
>
> * * * * * *
>
> Braid is made on special machines known as braiding or spindle machines.
>
> Varieties of braid include lacing (e.g., for boot or shoe laces), piping, soutache, ornamental cords, braided galloons, etc. Tubular braid may have a textile core.
>
> Braid is used for edging or ornamenting certain articles of apparel (e.g., decorative trim and piping) or furnishing articles (e.g., tiebacks for curtains), as sheathing for electrical wiring, for the manufacture of certain shoes laces, anorak or track suit cords, cord belts for dressing gowns, etc.

The construction of Sample A or Sample B is not obtained by twisting, cabling or by gimping. Rather, both are of braided construction. The articles are not yarns, but braids in the piece. They are, therefore, classified pursuant to GRI 1, under heading 5808, HTSUSA, which specifically provides for such articles. Both samples are classified in subheading 5808.10, which provides for braids in the piece.

We note that while Sample A and Sample B may not be strictly decorative, they are not as tightly plaited and compact as the braided articles of head-

ing 5607, HTSUSA, and are not suitable for the uses set forth for articles classified in that heading (as twine, cordage, ropes or cables). *See generally*, HQ 965230, dated June 3, 2002.

While a yarn that contains any amount of metal is regarded in its entirety as a "metalized yarn," a braid of heading 5808, HTSUSA, that contains any amount of metal is not regarded in its entirety as being of metalized yarn. The metallic strip in Sample A and Sample B is considered textile for tariff purposes because it meets the dimensional requirements of man-made fiber textile strips set forth in Note 1(g) to Section XI, HTSUSA.

As the braids at issue are classified under heading 5808, HTSUSA, and contain two or more textile materials, Subheading Note 2 to Section XI, HTSUSA, is applicable to them. Subheading Note 2, in pertinent part, states:

> 2. (A) Products of chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under note 2 to this section for the classification of a product of chapters 50 to 55 or of heading 5809 consisting of the same textile materials.
>
> (B) For the application of this rule:
>
> (a) Where appropriate, only the part which determines the classification under general interpretative rule 3 shall be taken into account[.]

Note 2 to Section XI, HTSUSA, in turn, states:

> Goods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over each other single textile material.

Where braids in the piece of heading 5808, HTSUSA, are composed only of interlaced textile material, the braid is akin to fabric of headings 50 to 55 and will be classified according to the textile material which predominates by weight pursuant to Note 2 to Section XI, HTSUSA. However, where braids in the piece of heading 5808, HTSUSA, are composed of an exterior braid of one material around a core of a different material, it is appropriate, pursuant to Subheading Note 2 to Section XI, HTSUSA, to take into account only the part which determines the classification of the braid under GRI 3. *See* HQ 957751, dated June 6, 1995. It would be in error to use chief weight alone to decide classification of the braid. *Id.* Such braids constitute composite goods. GRI 3(b) directs that for a composite good consisting of different materials, which cannot be classified by reference to GRI 3(a), classification shall be according to the component that imparts the essential character of the good.

In the case at hand, Sample A is composed only of metalized material. Note that the gimped strands in the construction, individually, are considered metalized yarns because their multifilament core is wrapped by metalized strip. Consequently, Sample A is classified in subheading 5808.10.9000, HTSUSA, which provides for: "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles: Braids in the piece: Other: Other."

Sample B, however, is composed of an exterior braid of metallic strip around a nylon core. Pursuant to Subheading Note 2 to Section XI,

HTSUSA, it is appropriate to take into account only the part which determines the classification of the braid under GRI 3. The braid cannot be classified pursuant to GRI 3(a). Under GRI 3(b), the exterior metallic strip imparts the essential character of the good. Sample B, therefore, is also classified in subheading 5808.10.9000, HTSUSA.

HOLDING:

The articles identified as Sample A and Sample B in NY J82797 are classified in subheading 5808.10.9000, HTSUSA, which provides for: "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles: Braids in the piece: Other: Other." The applicable column one, general duty rate under the 2005 HTSUSA is 4.2 percent *ad valorem*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUSA and the accompanying duty rates are provided on the world wide web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY J82797, dated April 10, 2003, is hereby revoked.

MYLES B. HARMON,
Director,
Commercial & Trade Facilitation Division.

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967829
CLA–2 RR:CR:TE 967829 BtB
CATEGORY: Classification
TARIFF NO.: 5808.10.9000

MS. YOLANDA S. MASSEY
IMPORT MANAGER
MICHAELS STORES, INC.
8000 Bent Branch Dr.
Irving, Texas 75063

Re: Classification of braid in the piece from Taiwan; NY J82793 revoked

DEAR MS. MASSEY:

On April 9, 2003, U.S. Customs and Border Protection (CBP) issued New York Ruling Letter (NY) J82793 to Michaels Stores, Inc. ("Michaels"). In NY J82793, CBP classified an article from Taiwan identified as "Style MXT-12210" under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Upon review of that ruling, we have found that the classification provided for this article is incorrect. This ruling, Headquarters Ruling Letter (HQ) 967829, hereby revokes NY J82793 and sets forth the correct classification of the article.

FACTS:

You submitted several samples of Style MXT-12210. The samples are identical except for color. They are the type of fancy cord used to wrap gifts and for similar uses.

In NY J82793, the Style MXT-12210 samples are described as: ". . . composed of a braided polyester core sheathed in a braid composed of six gimped strands (a multifilament cord wrapped by a metallic strip) mixed with numerous metallic strips, all braided together. . . . They measure 1/8" in diameter." While not stated in the ruling, Style MXT-12210 is not suitable for making or ornamenting headwear.

In NY J82793, CBP classified style Style MXT-12210 under subheading 5605.00.9000, HTSUSA, which provides for "Metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal: Other."

ISSUE:

Whether the article identified as Style MXT-12210 is classified in heading 5605, HTSUSA, as a metalized yarn or is it classified as a braid in the piece in heading 5808, HTSUSA.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied, in order.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Heading 5605, HTSUSA, provides for "Metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal." The ENs to heading 5605 state that, among other articles, the heading covers:

> (1) **Yarn consisting of any textile material (including monofilament, strip and the like and paper yarn) combined with metal thread or strip,** whether obtained by a process of twisting, cabling or by gimping, whatever the proportion of the metal present. . . .

Braided constructions are not provided for in the terms of heading 5605 or mentioned in the ENs to that heading.

Heading 5808, HTSUSA, however, does provide for braided constructions. In its entirety, the heading provides for: "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted;

tassels, pompons and similar articles." The ENs to heading 5808 state that the products classified in the heading, among other articles, include:

(1) **Flat or tubular braids.**

These are obtained by interlacing diagonally yarns, or the monofilament, strip and the like of Chapter 54.

* * * * * *

Braid is made on special machines known as braiding or spindle machines.

Varieties of braid include lacing (e.g., for boot or shoe laces), piping, soutache, ornamental cords, braided galloons, etc. Tubular braid may have a textile core.

Braid is used for edging or ornamenting certain articles of apparel (e.g., decorative trim and piping) or furnishing articles (e.g., tiebacks for curtains), as sheathing for electrical wiring, for the manufacture of certain shoes laces, anorak or track suit cords, cord belts for dressing gowns, etc.

Style MXT-12210's construction is not obtained by twisting, cabling or by gimping. Rather, it is of braided construction. The article is not yarn, but braid in the piece. It is, therefore, classified pursuant to GRI 1, under heading 5808, HTSUSA, which specifically provides for such articles.

We note that while Style MXT-12210 may not be strictly decorative, it is not as tightly plaited and compact as the braided articles of heading 5607, HTSUSA, and is not suitable for the uses set forth for articles classified in that heading (as twine, cordage, ropes or cables). *See generally*, HQ 965230, dated June 3, 2002.

While a yarn that contains any amount of metal is regarded in its entirety as a "metalized yarn," a braid of heading 5808, HTSUSA, that contains any amount of metal is not regarded in its entirety as being of metalized yarn. The metallic strip in Style MXT-12210 is considered textile for tariff purposes because it meets the dimensional requirements of man-made fiber textile strips set forth in Note 1(g) to Section XI, HTSUSA.

As Style MXT-12210 is classified under heading 5808, HTSUSA, and contains two or more textile materials, Subheading Note 2 to Section XI, HTSUSA, is applicable to it. Subheading Note 2, in pertinent part, states:

2. (A) Products of chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under note 2 to this section for the classification of a product of chapters 50 to 55 or of heading 5809 consisting of the same textile materials.

(B) For the application of this rule:

(a) Where appropriate, only the part which determines the classification under general interpretative rule 3 shall be taken into account[.]

Note 2 to Section XI, HTSUSA, in turn, states:

Goods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if con-

sisting wholly of that one textile material which predominates by weight over each other single textile material.

Where braids in the piece of heading 5808, HTSUSA, are composed only of interlaced textile material, the braid is akin to fabric of headings 50 to 55 and will be classified according to the textile material which predominates by weight pursuant to Note 2 to Section XI, HTSUSA. However, where braids in the piece of heading 5808, HTSUSA, are composed of an exterior braid of one material around a core of a different material, it is appropriate, pursuant to Subheading Note 2 to Section XI, HTSUSA, to take into account only the part which determines the classification of the braid under GRI 3. *See* HQ 957751, dated June 6, 1995. It would be in error to use chief weight alone to decide classification of the braid. *Id.* Such braids constitute composite goods. GRI 3(b) directs that for a composite good consisting of different materials, which cannot be classified by reference to GRI 3(a), classification shall be according to the component that imparts the essential character of the good.

In the case at hand, Style MXT-12210 is composed of metallic strands and strip around a polyester core. Pursuant to Subheading Note 2 to Section XI, HTSUSA, it is appropriate to take into account only the part which determines the classification of the braid under GRI 3. The braid cannot be classified pursuant to GRI 3(a). Under GRI 3(b), the exterior metallic material imparts the essential character of the good. Style MXT-12210, therefore, is classified in subheading 5808.10.9000, HTSUSA.

HOLDING:

The article identified as Style MXT-12210 in NY J82793 is classified in subheading 5808.10.9000, HTSUSA, which provides for: "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles: Braids in the piece: Other: Other." The applicable column one, general duty rate under the 2005 HTSUSA is 4.2 percent *ad valorem*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUSA and the accompanying duty rates are provided on the world wide web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY J82793, dated April 9, 2003, is hereby revoked.

MYLES B. HARMON,
Director,
Commercial & Trade Facilitation Division.

[ATTACHMENT F]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967830
CLA–2 RR:CR:TE 967830 BtB
CATEGORY: Classification
TARIFF NO.: 5808.10.7000, 5808.10.9000

JANET L. TELLES
GLOBAL COMPLIANCE MANAGER
SMITH INTERNATIONAL ENTERPRISES, LTD.
20600 Chagrin Blvd.
Suite 200
Shaker Heights, OH 44122

Re: Classification of braid in the piece from Hong Kong; NY H87352 modified

DEAR MS. TELLES:

On February 19, 2002, U.S. Customs and Border Protection (CBP) issued New York Ruling Letter (NY) H87352 to you. In NY H87352, CBP classified several samples of twine, yarns, and trimmings from Hong Kong under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Upon review of that ruling, we have found that the classifications provided for several samples are incorrect. This ruling, Headquarters Ruling Letter (HQ) 967830, hereby modifies NY H87352 and sets forth the correct classification of those samples.

FACTS:

In NY H87352, the samples at issue were identified as KS2, KS3, KS5 and KS6. In the ruling, KS3 and KS6 were described as:

> They are described as polypropylene and metallic. KS3 and KS6 are braided yarns. KS3 has four polypropylene multifilament strands braided with two metallic strips. KS6 has four multifilament strands of polypropylene braided with four multi-ply strands of multifilament yarn gimped (that is, wrapped) with metallic strips.

Also in NY H87352, KS2 was described as: ". . . a braided yarn composed of multiple multifilament strands of textile and metallic textile strip." KS5 was described as: ". . . a flat braided multifilament yarn gimped with metallic strip." While not stated in NY H87352, KS5 has a core composed of four twisted single multifilament yarns, which are laid out flat in parallel fashion. Its sheath is composed of sixteen gimped metallic yarns (each is a single multifilament yarn gimped, or wrapped, with metallic strip). These metallic yarns are braided around the core yarns, which are laid out parallel to each other, creating the flat braid.

In NY H87352, CBP classified KS2 and KS3 under subheading 5605.00.1000, HTSUSA, which provides for "Metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal: Metal coated or metal laminated man-made filament or strip or the like, ungimped, and untwisted or with twist of less than 5 turns per meter." Also in NY H87352, CBP classified KS5 and KS6 under subheading 5605.00.9000, HTSUSA, which provides for "Metalized yarn, whether or not

gimped, being textile yarn, or strip of the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal: Other."

ISSUE:

Whether the samples identified as KS2, KS3, KS5 and KS6 are classified in heading 5605, HTSUSA, as metalized yarns or are they classified as braid in the piece in heading 5808, HTSUSA.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied, in order.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Heading 5605, HTSUSA, provides for "Metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal." The ENs to heading 5605 state that, among other articles, the heading covers:

> (1) **Yarn consisting of any textile material (including monofilament, strip and the like and paper yarn) combined with metal thread or strip,** whether obtained by a process of twisting, cabling or by gimping, whatever the proportion of the metal present. . . .

Braided constructions are not provided for in the terms of heading 5605 or mentioned in the ENs to that heading.

Heading 5808, HTSUSA, however, does provide for braided constructions. In its entirety, the heading provides for: "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles." The ENs to heading 5808 state that the products classified in the heading, among other articles, include:

> (1) **Flat or tubular braids.**
>
> These are obtained by interlacing diagonally yarns, or the monofilament, strip and the like of Chapter 54.
>
> * * * * * *
>
> Braid is made on special machines known as braiding or spindle machines.
>
> Varieties of braid include lacing (e.g., for boot or shoe laces), piping, soutache, ornamental cords, braided galloons, etc. Tubular braid may have a textile core.

> Braid is used for edging or ornamenting certain articles of apparel (e.g., decorative trim and piping) or furnishing articles (e.g., tiebacks for curtains), as sheathing for electrical wiring, for the manufacture of certain shoes laces, anorak or track suit cords, cord belts for dressing gowns, etc.

The construction of the samples identified as KS2, KS3, KS5 and KS6 is not obtained by twisting, cabling or by gimping. Rather, all of these samples are of braided construction. The articles are not yarns, but braids in the piece. They are, therefore, classified pursuant to GRI 1, under heading 5808, HTSUSA, which specifically provides for such articles. Each of the samples is classified in subheading 5808.10, which provides for braids in the piece.

We note that while the samples identified as KS2, KS3, KS5 and KS6 may not be strictly decorative, they are not as tightly plaited and compact as the braided articles of heading 5607, HTSUSA, and are not suitable for the uses set forth for articles classified in that heading (as twine, cordage, ropes or cables). *See generally*, HQ 965230, dated June 3, 2002.

While a yarn that contains any amount of metal is regarded in its entirety as a "metalized yarn," a braid of heading 5808, HTSUSA, that contains any amount of metal is not regarded in its entirety as being of metalized yarn. The metallic strip in each of the constructions is considered textile for tariff purposes because it meets the dimensional requirements of man-made fiber textile strips set forth in Note 1(g) to Section XI, HTSUSA.

As the braids at issue are classified under heading 5808, HTSUSA, and contain two or more textile materials, Subheading Note 2 to Section XI, HTSUSA, is applicable to them. Subheading Note 2, in pertinent part, states:

> 2. (A) Products of chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under note 2 to this section for the classification of a product of chapters 50 to 55 or of heading 5809 consisting of the same textile materials.
>
> (B) For the application of this rule:
>
> (a) Where appropriate, only the part which determines the classification under general interpretative rule 3 shall be taken into account[.]

Note 2 to Section XI, HTSUSA, in turn, states:

> Goods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over each other single textile material.

Where braids in the piece of heading 5808, HTSUSA, are composed only of interlaced textile material, the braid is akin to fabric of headings 50 to 55 and will be classified according to the textile material which predominates by weight pursuant to Note 2 to Section XI, HTSUSA. However, where braids in the piece of heading 5808, HTSUSA, are composed of an exterior braid of one material around a core of a different material, it is appropriate, pursuant to Subheading Note 2 to Section XI, HTSUSA, to take into account only the part which determines the classification of the braid under GRI 3. *See* HQ 957751, dated June 6, 1995. It would be in error to use chief weight

alone to decide classification of the braid. *Id.* Such braids constitute composite goods. GRI 3(b) directs that for a composite good consisting of different materials, which cannot be classified by reference to GRI 3(a), classification shall be according to the component that imparts the essential character of the good.

In the case at hand, KS2, KS3 and KS6 are composed only of interlaced textile material. Accordingly, these articles are classified according to the textile material which predominates by weight. If the man-made fibers in these samples predominate by weight, the samples will be classified in subheading 5808.10.7000, HTSUSA, which provides for: "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles: Braids in the piece: Other: Of cotton or man-made fibers." However, if the metallic strip in the samples predominates by weight, the samples will be classified in subheading 5808.10.9000, HTSUSA, which provides for: "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles: Braids in the piece: Other: Other."

KS5 is composed of an exterior braid of sixteen gimped metallic yarns around a core of four twisted single multifilament yarns. Pursuant to Subheading Note 2 to Section XI, HTSUSA, it is appropriate to take into account only the part which determines the classification of the braid under GRI 3. The braid cannot be classified pursuant to GRI 3(a). Under GRI 3(b), the exterior metallic yarns impart the essential character of the good. The article, therefore, is classified in subheading 5808.10.9000, HTSUSA.

HOLDING:

The articles identified as KS2, KS3 and KS6 in NY H87352 are classified in subheading 5808.10, HTSUSA, which provides for: "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles: Braids in the piece." We are not able to classify these articles at the 8-digit or 10-digit level because we do not have information relating to which material predominates by weight in each construction. As a result, we cannot set forth a rate of the duty for the articles.

The article identified as KS5 is classified in subheading 5808.10.9000, HTSUSA, which provides for: "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles: Braids in the piece: Other: Other." The applicable column one, general duty rate under the 2005 HTSUSA is 4.2 percent *ad valorem.* Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUSA and the accompanying duty rates are provided on the world wide web at www.usitc.gov.

Note that if KS2, KS3, and/or KS6 are classified as of man-made fibers in subheading 5808.10.7000, HTSUSA, they will fall within textile category 229. Quota/visa requirements are no longer applicable for merchandise which is the product of World Trade Organization (WTO) member countries. The textile category number above applies to merchandise produced in non-WTO member countries. Quota and visa requirements are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information on quota and visa requirements applicable to this merchandise, we suggest you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas" which is

available on our web site at www.cbp.gov. For current information regarding possible textile safeguard actions on goods from China and related issues, we refer you to the web site of the Office of Textiles and Apparel of the Department of Commerce at otexa.ita.doc.gov.

EFFECT ON OTHER RULINGS:

NY H87352, dated February 19, 2002, is hereby modified as to the classification of KS2, KS3, KS5 and KS6. The classifications for the other articles in NY H87352 are correct and this ruling does not affect them.

MYLES B. HARMON,
Director,
Commercial & Trade Facilitation Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

Slip Op. 05–158

GUANGZHOU MARIA YEE FURNISHINGS, LTD., *et al.* Plaintiffs, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR FAIR TRADE, *et al.* Defendant-Intervenors.

Before: Pogue, Judge
Court No. 05–00065

[Department of Commerce's determination remanded.]

Dated: December 14, 2005

Arent Fox Kintner Plotkin & Kahn, PLLC (*Nancy A. Noonan* and *Patricia P. Yeh*) for the Plaintiff;

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division U.S. Department of Justice (*Michael D. Panzera*), Rachel Wenthold, International Attorney-Advisor, Of Counsel, Office of Chief Counsel for Import Amdinistration, Office of the General Commerce, U.S. Department of Commerce, for the Defendant;

King & Spalding LLP (*Joseph W. Dorn*, *Stephen A. Jones*, and *Jeffrey M. Telep*) for Defendant-Intervenor.

OPINION

POGUE, Judge: This case involves a challenge by Guangzhou Maria Yee Furnishings, Ltd., et.al. ("Maria Yee") to the Department of Commerce's ("Commerce" or "Defendant") determination in *Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 67,313, 67,317 (Dept. Commerce Nov. 17, 2004) (final determination of sales at less than fair value) ("*Final Determination*"). Plaintiff asserts that Commerce denied it separate rate status because Commerce improperly rejected as untimely evidence of Maria Yee's independence from the Chinese government's control.

In light of the court's decision in *Decca Hospitality Furnishings LLC, v. United States*, 29 CIT ___, 391 F. Supp. 2d 1298 (2005) ("*Decca*"), and the principles examined therein, the court remands this case for further consideration consistent with this opinion.

BACKGROUND

The procedural history of this matter is detailed in the court's decision in *Decca*. For ease of reference, the court summarizes the key facts here.

As in *Decca*, this case arises from the Department of Commerce's antidumping investigation of wooden bedroom furniture exporters/producers from the People's Republic of China ("PRC"). *See Wooden Bedroom Furniture from the People's Republic of China*, 68 Fed. Reg. 70,228, 70,228 (Dept. Commerce Dec. 17, 2003) (initiation of antidumping duty investigation) ("*Notice of Initiation*").

Because the PRC is a non-market economy ("NME"), in investigations of PRC exporters/producers, Commerce presumes that all companies operating in the PRC are state-controlled. Based on this presumption, in this investigation, Commerce applied the PRC antidumping rate of 198.08% to all companies that did not sufficiently demonstrate their independence from the Chinese government. *Final Determination*, 69 Fed. Reg. at 67,317. Those companies that were able to demonstrate both *de facto* and *de jure* independence from government control, *Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 35,312, 35,319–20 (Dept. Commerce June 24, 2004) (notice of preliminary determination and postponement of final determination) ("*Preliminary Determination*") were assigned an antidumping margin of 6.65%. *Wooden Bedroom Furniture from the People's Republic of China*, 70 Fed. Reg. 329, 330 (Dept. Commerce Jan. 4, 2005)(notice of amended final determination of sales at less than fair value and antidumping duty order). Commerce evaluated a company's independence from government control on the basis of information timely submitted by companies in response to Commerce's Section A Questionnaire. *Final Determination*, 69 Fed. Reg at 67,315; *Preliminary Determination*, 69 Fed. Reg. at 35,319–20; Section A Questionnaire, P.R. Doc 297 at A–1 ("Section A Questionnaire"). Commerce solicited responses to its Section A Questionnaire by sending the Section A Questionnaire to "mandatory respondents"[1] and to the Chinese Ministry of Commerce ("MOFCOM") on February 2, 2004, accompanied by a cover letter. Letter from Robert Bolling, Program Manager AD/CVD Enforcement III to Liu Danyang, Director Bureau of Fair Trade for Imports and Exports, Pl.'s Exh. 12, P.R. Doc. No. 297; *see also Decision Memoran-*

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[1] In large investigations, Commerce identifies certain participants as those required to respond during the investigation. 19 U.S.C. § 1677f–1(c)(2) (2000); 19 C.F.R. § 351.204(c) (2004), *see also* Department of Commerce Mem. from Deputy Assistant Sec'y, Imp. Admin., to James J. Jochum, Assistant Sec'y for Imp. Admin., *Re: Issues and Decision Memorandum for the Less-Than-Fair-Value Investigation of Wooden Bedroom Furniture from the People's Republic of China* (Dept. Commerce Nov. 8, 2004), P.R. Doc 1933 ("*Decision Memorandum*") at 337; *Final Determination*, 69 Fed. Reg. at 67,313.

dum, P.R. Doc 1933 at 345. Pursuant to 19 C.F.R. § 351.301(c)(2),[2] the February 2 letter established February 23, 2004 as the deadline for responses to the Section A Questionnaire from "all parties" and the mandatory respondents. February 2 Letter, P.R. Doc. No. 297 at 2.

Like the plaintiff in *Decca*, Maria Yee was not selected as a mandatory respondent and asserts that it did not receive any requests for information from Commerce. Pl.'s Mem. Supp. Mot. J. Agency R. Pursuant to Rule 56.2 at 6 ("Pl. Br"); Pl. Reply Def.'s and Def. Int.'s Mem. Opp. Pl.'s Rule 56.2 Mot. J. Agency R. at 2; *Decision Memorandum*, P.R. Doc 1933 at 321. Because Maria Yee did not timely respond to the Section A Questionnaire, Commerce found that Maria Yee was state-controlled and therefore applied the PRCwide antidumping rate of 198.08% to Maria Yee.

On June 24, 2004, the Department of Commerce published its *Preliminary Determination* and therein made explicit its reliance on responses to the Section A Questionnaire for the determination of separate rates for non-mandatory respondents. *Preliminary Determination*, 69 Fed. Reg. at 35,319–20. Maria Yee asserts that this was the first public statement by Commerce about the use of Section A Questionnaires for separate rate applications in this investigation. Pl. Br. at 15. After the publication of the *Preliminary Determination*, on July 2, 2004, Maria Yee filed its response to the Section A Questionnaire. Pl. Br. at 9; *see also* Maria Yee's Section A Response in Wooden Bedroom Furniture from the People's Republic of China, Letter from Jerome J. Zaucha & Nancy A. Noonan, Arent Fox, to Donald L. Evans, Sec'y of Commerce, Attn: Imp. Admin, Int'l Trade Admin, *Re: Submission of Section A Response by Maria Yee in Wooden Bedroom Furniture from the People's Republic of China* (July 2, 2004), Pl.'s Exh. 9.

Commerce rejected Maria Yee's Section A submission asserting that it was untimely because it was received after the February 23, 2004 deadline. *Decision Memorandum*, P.R. Doc. 1933 at 324. Commerce based its rejection of the information on the fact that its "consistent past practice has been to require companies to respond to the Department's Section A questionnaire, regardless of whether wholly owned by a market-economy entity." *Decision Memorandum*, P.R. Doc. 1933 at 337. Moreover, Commerce reasoned that its February 2,

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[2] Pursuant to 19 C.F.R. § 351.301(c)(2):

(i) Notwithstanding paragraph (b)[see infra n.3] of this section, the Secretary may request any person to submit factual information at any time during a proceeding.
(ii) In the Secretary's written request to an interested party for a response to a questionnaire or for other factual information, the Secretary will specify the following: the time limit for the response; the information to be provided; the form and manner in which the interested party must submit the information; and that failure to submit requested information in the requested form and manner by the date specified may result in use of the facts available under section 776 of the Act and § 351.308.

2004 letter to MOFCOM and the mandatory respondents provided "sufficient notice and opportunity to respond to the Department's Section A questionnaire." *Id.* at 345.

Maria Yee contends that it is a Hong Kong-based producer of wooden bedroom furniture that is independent from the Chinese government, and further contends that it had no notice from Commerce of the Section A Questionnaire, or of any deadlines associated with the Questionnaire. Maria Yee brings this action under USCIT R. 56.2 seeking a restoration of its July 2, 2004 submissions to the record, and asking the court to order the Department of Commerce to grant Maria Yee the 6.65% separate rate.

Commerce asserts that Maria Yee was unknown to Commerce. Moreover, Commerce argues that Maria Yee was not entitled to rely on or expect that Commerce would provide it with notice of the Section A filing deadline. Rather, Commerce argues that because it did not have knowledge of Maria Yee's status as a producer of wooden bedroom furniture, it was appropriate for Commerce to provide notice by means of its letter to MOFCOM, as Commerce could not have provided personal service.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(c). The court must sustain Commerce's determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

To act in accordance with law, an agency, may not refuse to recognize its own rules or regulations where it may prejudice a party. *Steen v. United States*, 29 CIT ___ , Slip Op. 05–131 (Oct. 3, 2005) at 4–5 (citing *Ariz. Grocery Co. v. Atchison, Topeka & Sante Fe Ry. Co.*, 284 U.S. 370, 389 (1932)); *but cf. Kemira Fibres Oy v. United States* 61 F. 3d 866, 875–76 (Fed. Cir. 1995) (as a general rule an agency is required to comply with its own regulations, however, if no prejudice is shown by such default, a plaintiff cannot benefit from failure to adhere to its own regulations, when Commerce has missed its own deadline). At the same time, an agency's interpretation of its governing statute is due deference, and must be upheld unless it is unreasonable. *United States v. Haggar Apparel Co*, 526 U.S. 380, 386–90 (1999) (discussing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

Here, if Commerce, contrary to its own regulations, improperly rejected Maria Yee's submissions it thereby improperly presumed Maria Yee's place of incorporation (not to be Hong Kong), in which case Commerce's findings are unsupported by substantial evidence and the case must be remanded for Commerce to enter a factual finding. *Fl. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if

the agency has not considered all relevant factors . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.").

DISCUSSION

A.

The timelines set out in Commerce's regulations provide a final deadline, as established by 19 C.F.R. § 351.301(b)(2)[3], and a deadline for specific submissions, established by 19 C.F.R § 351.301(c)(2)(ii). *See* n. 2 *supra.* Commerce rejected Maria Yee's information as untimely even though it was submitted before the deadline established by § 351.301(b)(2),[4] claiming the controlling deadline was established by § 351.301(c)(2)(ii). Accordingly, to sustain Commerce's determination the court must find that Commerce properly invoked Section 351.301(c)(2)(ii).

Section 351.301(c)(2)(ii) provides the time limits and deadlines for "[q]uestionnaire responses and other submissions on request." It states that in a written request "*to* an interested party for a response to a questionnaire or for other factual information" the Secretary will specify:

> the time limit for the response; the information to be provided; the form and manner in which the interested party must submit the information; and that failure to submit requested information in the requested manner by the date specified may result in use of the facts available under section 776 of the Tariff Act and § 351.308.

19 C.F.R. § 351.301(c)(2)(ii).

The purpose of this regulation is to allow Commerce to obtain the information it needs in its antidumping investigations. 19 C.F.R. § 351.301(a). Commerce promulgated these regulations so as to clarify filing requirements and deadlines for parties because in the "past there ha[d] been some confusion over the deadline of submis-

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[3] Section 351.301(b)(1) states that for a final determination in an antidumping investigation, submission of factual information is due no later than "seven days before the date on which the verification of any person is scheduled to commence." This provision establishes a deadline, in this matter, of July 6, 2004 (the verification process was due to commence on July 12th, and the 5th was a federal holiday).

[4] Specifically, Commerce claims that § 351.301(b)(2) provides time limits for the verification of information previously submitted, and not for the submission of new information. The court, of course, defers to Commerce's reasonable interpretation of its own regulations. *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994). However, 301(b)(1) does provide a definitive deadline and, by its terms, it is not specifically limited to previously submitted information. Additionally, the section can be read so as to provide a deadline for which Commerce can proceed to the verification of all information provided previous to this deadline.

sion of factual information." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,331 (Dept. Commerce May 19, 1997)("*Preamble*"). Given that Commerce exercises considerable discretion in what information it seeks from interested parties to the investigation, and the timelines for their submissions, in instances of requiring additional information through the use of questionnaires, Commerce, through its regulation, provided for individual notice. 19 C.F.R. § 351.301(c)(2)(ii); *Decca*, 391 F. Supp. 2 at 1316 ("Commerce has traded convenience for flexibility – it must take the bitter with the sweet in this trade-off."). Additionally, Commerce, was well aware of the burden that such information gathering might place on smaller, less informed, foreign parties. *See Preamble*, 62 Fed. Reg. at 27,334 ("[S]ection 782(c)(2) of the Act provides that the Department will take into account difficulties experienced by interested parties, particularly small companies, in supplying information, and will provide any assistance that is practicable.").

Commerce claims that when Maria Yee submitted information on July 2, 2004, it missed the February 23, 2004 deadline for submitting information established by the MOFCOM letter pursuant to Section 351.301(c)(2)(ii). Accepting that the deadline is established by Section 351.301(c)(2)(ii), the inquiry becomes, did Commerce send acceptable notice "to" the parties as required by its own regulations? 19 C.F.R. § 351.301 (c)(2)(ii); *see also Preamble*, 62 Fed. Reg. at 27,333, ("Section 351.301)(c)(2)(ii) provides that the Department *must* give notice of certain requirements to *each* interested party from whom the Department requests information.")(emphasis added).

In Decca, this court held that where Commerce knows of a party's existence, Commerce may not rely on a "method of notice . . . not reasonably calculated to provide parties with actual notice of the filing requirements." Decca, 391 F. Supp. 2d at 1310. In Decca this holding was based on the regulation, 19 C.F.R. § 351.301, in which "Commerce has voluntarily assumed the obligation to send questionnaires to all parties." Decca, 391 F. Supp. 2d. at 1316.

Maria Yee represents the next step of the analysis. To what extent is Commerce obligated to provide notice to unknown parties as to information requirements and deadlines? The court here finds that Commerce should have at least provided notice by publication.

Commerce claims that it could not give actual notice to an interested party of which it was unaware, and the court agrees that to the extent the parties were not known to Commerce, Commerce is circumscribed in providing actual notice.[5] Conceding this point, the

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[5] The court does not address here the issue of which parties were known and which parties were unknown to Commerce and why. It appears from the record that Commerce knew of 211 producers of wooden bedroom furniture. *Preliminary Determination*, 69 Fed. Reg. at 35,313. Commerce has not indicated how it came to know of these producers, and what pro-

question then becomes what form of notice would be reasonable and viable to apprise parties that they would need to fill out the Section A Questionnaire by February 23, 2004 in order to be considered for a separate rate?

B.

Commerce's main contention is that it provided notice *through* MOFCOM, and that providing notice to interested parties in such a manner was reasonable. Def.'s Mem. Opp. Pl.'s Rule 56.2 Mot. J. Agency R. at 19 ("Def. Br."). Commerce's argument, therefore, hinges on its claim that notice to MOFCOM was "reasonably calculated" to apprise unknown parties of the Section A filing requirement and the February 23 filing deadline applied here.[6]

Commerce's contention is both qualitative and quantitative. Commerce's quantitative contention is based on the number of completed Section A Questionnaire submissions received. Commerce's qualitative analysis is that MOFCOM is in the best position to know of and contact interested parties and therefore it is reasonable and preferable for Commerce to rely on MOFCOM to provide notice to the parties.[7] The court considers each argument in turn.

In its quantitative argument, Commerce attempts to show, by citing the number of responses to the Section A Questionnaire, that notice through MOFCOM was reasonably calculated to alert interested parties. *Id.* Commerce points to the fact that 120 producers of wooden bedroom furniture producers timely responded to the Section A Questionnaire, four of whom were parties unknown to Commerce, as supporting the reasonableness of this method of notice. Def. Suppl. Brief at 3–5. This court has addressed the fact that the number of responses is in no way indicative of the reasonableness of this method of notice. *Decca*, 391 F. Supp. 2d at 1310 n.17. However,

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cedures it follows in order to ascertain producers, other than sending a letter to MOFCOM. If Maria Yee were "reasonably ascertainable," that is could be identified through "reasonably diligent efforts" it might have been necessary to send Maria Yee "[n]otice by mail or other means as certain to ensure actual notice." *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 491 (1988) (quoting *Mennonite Bd. of Missions v. Adams* 462 U.S. 791, 798 n.4 & 800 (1983); *but cf. Dusenbury v. United States*, 534 U.S. 161 (2002)(providing notice by sending a certified letter to a prison inmate satisfied the requirements of notice, even though the inmate did not receive the notice). Unknown parties, on the other hand, are those parties whose "interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge. . . ." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950); *see also Chemetron Corp. v. Jones*, 72 F. 3d 341,345–46 (3rd Cir. 1995); *In re U.S.H. Corp of NY v. U.S. Home Corp.*, 223 B.R. 654, 659–60 (Bankr. S.D.N.Y. 1998). As we do not know the extent to which Commerce searched for wooden bedroom furniture manufacturers in China, we are proceeding under the assumption that Maria Yee is properly classified as an unknown party.

[6] For a more detailed consideration of this issue see *Decca*, 391 F. Supp. 2d at 1310–11.

[7] *See Decca*, 391 F. Supp. 2d at 1307–09 for a more detailed discussion of the unreasonableness of relying on MOFCOM to help parties rebut a presumption of state control.

Commerce continues to cite to raw numbers as a means of indicating the reasonableness of its method. Commerce has advanced no new support or arguments as to how sending MOFCOM a questionnaire, that included a statement of the deadline for submission, is a reasonably calculated means of providing notice to parties.

Neither Commerce nor the Defendant-Intervenors demonstrate that the number of responses is in any way related to the letter to MOFCOM, or that MOFCOM is in a better position to know of interested parties. If anything, Commerce has indicated that it received fewer responses by sending a Section A Questionnaire to MOFCOM, 126 including mandatory respondents, *Final Determination*, 69 Fed. Reg. at 35,313, than it did by sending the Quantity and Value ("Q & V") Questionnaire directly to the parties, 137, *id.* at 35,320. Moreover, the Section A Questionnaire was sent later in the investigation, the parties were provided with more time to answer the Section A Questionnaires than the Q & V Questionnaire, and the Section A Questionnaire was the questionnaire that was determinative of a party's eligibility for a separate rate. In sum, Commerce's numbers do not prove reasonableness.

Qualitatively, Commerce claims MOFCOM was in the best position to know of interested parties. The fundamental problem with this method of claiming reasonableness is that even if MOFCOM is best situated for this task, MOFCOM was not required to forward the Questionnaires to the parties; indeed Commerce did not even request MOFCOM to forward the Section A Questionnaire to third parties, February 2 Letter, P.R. Doc. No. 297; *Decca*, 391 F. Supp. 2d at 1311. To rely on a government instrumentality to forward a letter in order to provide notice, when this instrumentality is under no obligation to do so, is in contravention of settled case law. *See Wuchter v. Pizzutti* 276 U.S. 13, 24–25 (1928) (a statute designating the Secretary of State as the person to receive process must contain a provision that makes it reasonably probable that the service be communicated to the party to be sued); *Koster v. Automark Indus., Inc.*, 640 F. 2d 77, 81 n. 3 (7th Cir. 1981) ("a statutory provision is not reasonably calculated to provide notice unless its terms relating to the sending of notice are mandatory."); *Howard v. Jenny's Country Kitchen, Inc.*, 223 F.R.D. 559, 564–66 (D. Kan. 2004) (service not proper when made on the Kansas Secretary of State who mailed summons to the wrong place).

Contrary to Commerce's assertions that MOFCOM is better placed to ascertain interested parties and their addresses, Commerce has not demonstrated that MOFCOM is an appropriate partner in notifying parties. Indeed, Commerce's own experience has been that MOFCOM does not respond to Commerce's inquiries. *See Preliminary Determination*, 69 Fed. Reg at 35,321 (noting the failure of the Government of the PRC to respond to the Section A Questionnaire). In the Preliminary Results in *Certain Cased Pencils*, the PRC Minis-

try of Foreign Trade and Economic Cooperation ("MOFTEC"), the predecessor to MOFCOM, did not respond to requests from Commerce requesting that MOFTEC forward questionnaires to unlocatable parties. Finally, the China Chamber of Commerce for Import & Export of Light Industrial Products and Arts-Crafts responded stating that it managed to forward the questionnaire to only two of the seventeen parties for which Commerce did not have a correct address. *Certain Cased Pencils From the People's Republic of China*, 67 Fed. Reg. 2402, 2403 n.1 (Dept. Commerce Jan. 17, 2002) (preliminary results and recission in part of antidumping duty administrative review). (Commerce ultimately never received responses from any of the seventeen parties for which it solicited aid from MOFTEC. *Id.*)

That Commerce's approach was not reasonable is underscored here by an entirely feasible and customary alternative: notice by publication in the Federal Register. *Mullane*, 339 U.S. at 315 (stating that reasonableness of the form of notice chosen may be defended if the "form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."); *Goldhofer Fahrzeugwerk GmbH & Co. v. United States*, 885 F. 2d 858, 861 (Fed. Cir. 1989)("the reasonableness of the notice provided must be tested with reference to the existence of feasible and customary alternatives and supplements to the form of notice chosen.") (quoting *Greene v. Lindsey*, 456 U.S. 444, 454) (1982)(internal citations omitted).

It is well-established that the "Federal Register is a publication in which the public can find the details of the administrative operations of Federal agencies." H. R. Rep. No. 89–1497 (1966) reprinted in 1966 U.S.C.C.A.N. 2418, 2424 (1966) (discussing the Freedom of Information Act).[8] Moreover, that notice by publication is a feasible and customary substitute for unknown parties is uncontroverted. *See Mullane* 339 U.S. at 317 (notice by publication to unknown parties is sufficient); *Tulsa*, 485 U.S. 478, 490 ("For creditors who are not 'reasonably ascertainable' publication notice can suffice."); *Rodway v. U. S. Dep't of Agric.*, 514 F. 2d 809, 815 (D.C. Cir. 1975) ("Absent actual notice, the public should be held accountable only for notice plainly set forth in the *Federal Register*."); *Chemetron*, 72 F. 3d 341 (notice by publication sufficient for unknown parties); *Friedman v. N.Y. City Dep't of Hous. and Dev. Admin.*, 688 F. Supp. 897, 901 (S.D.N.Y. 1988) ("As notice by publication, the usual form of con-

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[8] The report continues "[t]hey would be able to find out where and by whom decisions are made in each Federal agency and how to make submittals or requests." The legislative history makes clear that the Act seeks to provide "incentive for agencies to publish "the necessary details about their official activities in the Federal Register" through the "provision that no person shall be 'adversely affected' by material required to be published – or incorporated by reference – in the Federal Register but not so published." H. R. Rep. No. 89–1497, 1966 U.S.C.C.A.N. at 2424 (1966).

structive notice was not undertaken in this case, the court must consider whether the individual plaintiffs were constructively notified in any other suitable manner."); *In re U.S.H. Corp.*, 223 B.R. at 6660 (unknown creditors, who would have only been found by conjecture, received constructive notice through publication).

In the case at bar, Commerce's attempt to provide notice through MOFCOM is not one that is supported by reliability, obligation, regulation, or statute. Particularly in comparison to a more traditional form of providing notice, notice by publication, Commerce's method of providing notice here was not reasonable.

D.

Commerce and Defendant-Intervenors state that after being put on notice of the investigation, Maria Yee had a duty to inquire as to the further steps, if any, they were required to take. Commerce's argument essentially rests on the proposition that all forms of constructive notice are equal; therefore, so long as notice to MOFCOM was "constructive notice," Commerce's method of notice was proper.

The problem with this view is that it is in contradiction to the announced regulation. Commerce does not point to any publication where it announces that parties interested in being evaluated for a separate rate need to inquire of either MOFCOM or the Department of Commerce, or search on the internet for additional forms and deadlines. Nor does Commerce assert that the form of notice provided was in accordance with its own regulations. Rather, Commerce asks the court to read a regulation that states affirmatively that Commerce will contact parties directly, as one that somehow puts parties on notice that they are required to contact Commerce or the Chinese Government to determine the steps they are required to take. Commerce's request is not reasonable.

As directed by the *Notice of Initiation*, the parties looked to the announced policy and regulations of the Commerce Department, in order to ascertain how Commerce would be conducting the investigation and the time limits that would be employed. *Notice of Initiation*, 68 Fed. Reg. at 70,229, 70,231. As noted previously, the regulations state that when additional information is needed from the parties, Commerce will send a written request to the parties. 19 C.F.R. § 351.301(c)(2)(ii); *Preamble*, 62 Fed. Reg. at 27,333. The regulations do not make parties aware that they need to contact other bodies, or search the internet, in order to ascertain what additional material is required of them.

Commerce also argues that Maria Yee had actual notice of the deadline for the Section A Questionnaire, as Annex III of 19 C.F.R pt. 351 provides that "the general deadline for Section A of the questionnaire in investigations is 51 days after initiation, . . . and further indicates that all parts of the questionnaire need to be completed prior to Commerce's preliminary determination." Def. Br. at 27. Annex III,

in the form of a table, does state the general deadline for the submission of the Section A Questionnaire is 51 days after the *Notice of Initiation*. 19 C.F.R. pt. 351, Annex III; *see also Decca* 391 F. Supp. 2d at 1306 n. 13. However, this information cannot constitute notice to the parties of the need to fill out a Section A Questionnaire. A party would only become aware of the applicability of the general deadline, were they put on notice of the need to fill out the Section A Questionnaire. Commerce cannot claim that its prior practice or decisions provide such notice. *See Decca*, 391 F. Supp. 2d at 1311–14. Moreover, footnote 1 to Annex III indicates the discretionary nature of these deadlines by emphasizing that the deadlines are approximate, and can be established by the Secretary. 19 C.F.R. pt. 351, Annex III. This underscores the point that notice of the applicable deadlines was to be provided by reliance on § 351.301(c)(2)(ii) through written request by the Secretary to interested parties.

Commerce also argues that Maria Yee had actual notice of the Section A Questionnaire because Maria Yee obtained the Respondent Selection Memorandum. Commerce's claim is, at least, uncertain as the Respondent Selection Memorandum does not provide any notice as to the requirement for non-mandatory respondents to submit Section A Questionnaires, nor of a deadline for filing; but, even more importantly, this is a question of fact which Commerce has not found. Therefore, this court may not find it for them. If Commerce wishes to argue that Maria Yee had actual notice of the Section A Questionnaire and its attendant deadlines through the Respondent Selection Memorandum, it must make a factual determination that Maria Yee received this Memorandum prior to the February 23, 2004 deadline.

As noted in *Decca*, the court understands the difficulties that Commerce faces in identifying multiple parties in China, and sending direct notification to their addresses. *Decca*, 391 F. Supp. 2d at 1316. However, as Commerce has itself assumed a duty of providing notice to parties, 19 C.F.R § 351.301(c)(2), *Preamble*, 62 Fed. Reg. at 27,333, Commerce's means of providing notice must be "reasonably calculated" to provide notice and more than that of a "mere gesture," *Mullane*, 399 U.S. at 315, and cannot be relying on "chance alone" to reach the interested party, *Goldhofer*, 885 F. 2d at 861.

CONCLUSION

For the foregoing reasons the court remands this case to Commerce for reconsideration consistent with this decision. Commerce's remand determination shall be filed by January 30, 2006, and Parties' comments due by February 13, 2006. Rebuttal comments shall be filed by February 27, 2006.

IT IS SO ORDERED.

Slip Op. 05–159

DECKERS CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.

Court No. 02–00674

[Defendant's motion for summary judgment as to classification of sandals from China denied.]

Dated: December 15, 2005

Rode & Qualey (*Patrick D. Gill*, *Michael S. O'Rourke* and *William J. Maloney*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*); and Office of Assistant Chief Counsel, U.S. Customs and Border Protection (*Michael W. Heydrich*), of counsel, for the defendant.

Memorandum & Order

AQUILINO, Senior Judge: In Hebrew, Teva means Nature. In American, it can mean sandals under patent that have been produced in Hong Kong for import here, the tariff classification of three models of which, the *Pretty Rugged Sport Sandal*, the *Terradactyl Sport Sandal*, and the *Aquadactyl Sport Sandal*, is the basis of this test case within the meaning of USCIT Rule 84(b). Upon entry of those particular *Teva*®s through the port of Los Angeles, California, the U.S. Customs Service, as it was then still known, classified them under heading 6404 (footwear with outer soles of rubber or plastics and uppers of textile materials) of the Harmonized Tariff Schedule of the United States ("HTSUS") (1998), in particular subheading 6404.19.35 at a rate of duty of 37.5 percent *ad valorem*. The plaintiff protested that classification, taking the position that those sandals should have been classified under subheading 6404.11.80, which prescribed a duty of 20 percent *ad valorem* plus 90¢ per pair valued over $6.50 but not over $12. Customs denied the protest, and this case commenced.

I

The court's jurisdiction is pursuant to 28 U.S.C. §§ 1581(a), 2631(a). The gravamen of plaintiff's complaint is that its merchandise is "athletic footwear", which is sold as such "for sporting and athletic purposes including, but not limited to, whitewater river rafting". Complaint, para. SEVENTEENTH. Following the filing of defendant's answer and the completion of discovery, counsel for the

plaintiff filed a formal request for trial in the federal courthouse in Santa Barbara, California[1], which apparently is located near its corporate headquarters and possible witnesses. The defendant objected to that request, in part upon the stated ground that

> [w]hether Customs correctly interpreted subheading 6404.11.80, HTSUS, to require that the imported sandals be *ejusdem generis* with the named exemplars is a question of law. As such, there is no genuine issue of material fact in dispute as to that question, which can be decided on summary judgment. Moreover, the thrust of the plaintiff's complaint rests on the meaning of the competing tariff provisions. . . . If the Court decides on summary judgment that the imported sandals are not *ejusdem generis* with the named exemplars, then there is no need for a trial.

Defendant's Opposition to the Plaintiff's Request for Trial, pp. 4–5 (citation and footnote omitted).

Upon hearing both sides with regard to this opposition, the court granted the defendant leave first to interpose a motion for summary judgment on the issues that it claims are dispositive of this test case. As posited in such motion subsequently filed, they are:

1. Whether . . . Customs . . . correctly classified the imported sandals under subheading 6404.19.35, HTSUS, as "footwear with open toes or open heels," etc.

2. Whether the imported sandals should have been classified under subheading 6404.11.80, HTSUS, as "tennis shoes, basketball shoes, gym shoes, training shoes and the like" *etc.*, as contended by the plaintiff.

Defendant's Brief, p. 1. Plaintiff's papers in opposition formulate the questions as follows:

> 1. Whether the term "tennis shoes, basketball shoes, gym shoes, training shoes and the like" in subheading 6404.11 covers all athletic footwear (other than sports footwear as defined in subheading Note 1 to Chapter 64).
>
> 2. Whether the term "athletic footwear" in Additional U.S. Note 2 to Chapter 64 is an *eo nomine* provision which includes all forms of athletic footwear.

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[1] *Cf.* USCIT Rule 77(c)(2).

> 3. Whether there are genuine issues of material fact as to whether the imported merchandise is within the common meaning of the term "athletic footwear."

Plaintiff's Brief, p. 2. The last question presented is a reflection of plaintiff's continuing opposition to resolution of this action without trial *viz.*:

> . . . In this instance defendant "bears the burden of demonstrating the absence of all genuine issues of material fact." *Avia Group Int'l. Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed.Cir. 1988). Plaintiff has identified . . . numerous material issues concerning "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Because this action puts into issue the use, characteristics or properties of the merchandise being classified, summary judgment is not warranted. *See, Brother Int'l. Corp. v. United States*, 248 F.Supp.2d 1224, 1226 (CIT 2002).

Id. at 1–2.

II

As required by USCIT Rule 56(h), defendant's motion includes a separate, short and concise statement of the material facts as to which it contends there is no genuine issue to be tried, to wit:

> 1. The plaintiff imported sandals . . . in Entry No. 275–0139524–1 . . . [, which] was liquidated . . . under subheading 6404.19.35, . . . HTSUS. . . . The plaintiff filed Protest No. 2704–99–100787 with . . . Customs . . . , claiming that the entry should have been classified under subheading 6404.11.80, HTSUS. . . .
>
> 2. . . . Customs denied that part of Protest No. 2704–99–100787 directed to the plaintiff's claim to classification of the imported sandals under subheading 6404.11.80 HTSUS . . . based on HQ 963395 ruling, which issued on April 2, 2002. . . .
>
> 3. The imported merchandise in issue consists of three styles . . . [that] are shown in the plaintiff's catalog, which is entitled "Teva Footwear and Apparel Spring 2000." The Pretty Rugged sandal is shown on page 9 . . . , the Terradactyl sandal is shown on pages 8 and 9 . . . , and the Aquadactyl sandal is shown on page 6. . . . Copies of these pages . . . are included in Defendant's Exhibit A. . . .

> 4. The sandals in issue[ ] have uppers composed of textile materials and soles composed of rubber or plastics. . . . The front or toe end of each sandal's upper consists of two flat, looped, textile straps that are joined together by a plastic ring. The longer of the two looped straps is adjustable and secures with a hook and loop fabric closure. The straps are attached to the sandal's foot bed to anchor the strap at two points. The rear or heel end of each upper consists of two flat, looped, textile side posts which are attached to the sandal's foot bed. Each post is joined by a plastic ring to adjustable ankle straps which secure with hook and loop fabric closures at the front and back of the ankle. The front straps are connected to the rear straps by a flat looped strap of textile material. The sandals are open at the toe, heel, top and sides. . . .
>
> 5. The sandals in issue do not have, or have provision for, the attachment of spikes, sprigs, cleats, stops, clips, bars or the like. . . .

Citations omitted. That Rule 56(h) provides that all material facts in the statement required to be served by the moving party will be deemed admitted unless controverted by the statement required to be served by the opposing party. Plaintiff's response is set forth in Section III B of its brief under the heading: "Plaintiff Does Not Agree that Most of Defendant's Numbered Statements of Material Facts Are Not At Issue." It makes no reference to defendant's paragraph 5, which is thus deemed admitted. *Cf.* Plaintiff's Brief, p. 11; Subheading Note 1, ch. 64, HTSUS. As for the four other paragraphs, plaintiff's response is not in keeping with the expectation of that rule or of this court.

Be that as it is, plaintiff's position is and has been clear: it desires a trial in order to attempt to prove its own Statement of Genuine Material Facts Which Are at Issue[2], to wit:

> 1. The merchandise in question is "athletic footwear" as provided for in Additional U.S. Note 2 to Chapter 64.
>
> 2. The imported merchandise is sold as athletic footwear.
>
> 3. Merchandise in issue is used for sporting and athletic purposes including, but not limited to, whitewater rafting.

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[2] Complete capitalization deleted.

4. The imported merchandise is sold under the registered trademark Teva® and is patented in the United States Patent Office (Patent #4,793,075), described as "SPORT SANDAL FOR ACTIVE WEAR."

5. Teva® sport sandals are conducive to fast footwork associated with athletic activities.

6. The imported footwear is the type commonly referred to by the footwear industry and consumers as sport sandals or athletic sandals.

7. Sport sandals are recognized as athletic footwear by the footwear industry.

See also Plaintiff's Brief, pp. 17–24.

Defendant's Response to Plaintiff's Statement of Material Facts at Issue, attached to its reply brief[3], denies these averments. *See also* Defendant's Brief in Reply, pp. 15–19. That brief argues that, even assuming *arguendo* that the allegations in paragraphs 2–7 are true, the sandals at bar still are not athletic footwear for tariff purposes because they are not tennis shoes, basketball shoes, gym shoes, training shoes, or like those shoes. *See id.* at 17–19. Whatever the precise formulation of the issue(s), the court cannot conclude that resolution thereof can be achieved without trial of any of plaintiff's averments of fact.

A

The physical appearance of the merchandise cannot be disputed. In its complaint, the plaintiff points to U.S. Patent Number 4,793,075, an abstract of which states:

> A sandal with an elongated sole configured to the profile of a human footprint with a toe end and a heel end, employs a toe strap connected at two anchor points to grip the forward part of [a] user's foot and a heel strap connected at two anchor points to grip the ankle of a user's foot with a lateral strap connected between the toe strap and the heel strap which is located on the outside of the sole and parallel to its surface so it is operable to stabilize the other straps and to maintain essentially constant tension in the individual straps as the sole flexes, with the toe and heel straps being infinitely adjustable so the wearer can cinch the sandal to his foot by adjusting said straps in a manner that it will not be dislodged during rigorous activity.

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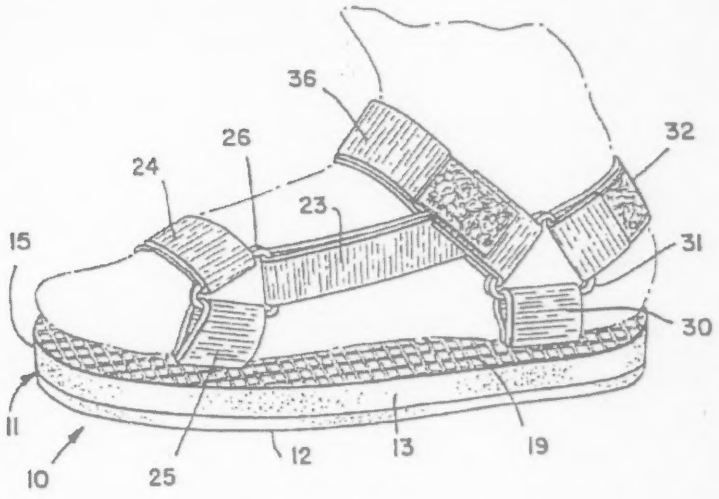
[3] *Id.* Defendant's motion for leave to file this "oversized" presentation can be, and it hereby is, granted.

Indeed, the quality of the written submissions on both sides obviates the need to grant plaintiff's motion for oral argument, which is thus hereby denied.

Plaintiff's Exhibit 2, p. 1. FIG _ 2 of that patent provides a schematic representation that is reproduced below:



As indicated, this product has both an open toe and open heel which place it within the ambit of subheading 6404.19.35, HTSUS[4], to wit:

6404	Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials:
	Footwear with outer soles of rubber or plastics:
6404.19	Other:
	Footwear with open toes or open heels; . . .
6404.19.35	Other: . . . . .

Nonetheless, the plaintiff argues that General Rule of Interpretation ("GRI") 3(a) calls for classification under a more specific description. That rule states, in part:

> When . . . goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

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[4] The sandals do not land under subheading 6404.19.25, HTSUS, because they are more than ten percent by weight of rubber or plastics. *See* Defendant's Motion for Summary Judgment, Declaration of Richard G. Foley, para. 5.

> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. . . .

And since GRI 6 allows for application of the rule to subheadings, the plaintiff contends that the more specific classification lies in 6404.11.80[5], *viz*:

6404.11	Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like:
	Other:
6404.11.80	Valued over $6.50 but not over $12/pair . . . . .

The defendant does not agree.

III

To determine whether the merchandise at bar should have been classified under this subheading, the court must first ascertain the meaning of the relevant tariff terms. *See, e.g., Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994); *Warner-Lambert Co. v. United States*, 28 CIT ___, ___, 341 F.Supp.2d 1272, 1276 (2004), *aff'd*, 425 F.3d 1381 (Fed.Cir. 2005). This, of course, is fundamentally a question of law. *E.g., Universal Electronics Inc. v. United States*, 112 F.3d 488, 491 (Fed.Cir. 1997); *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed.Cir. 1995).

A

The plaintiff is of the view that the term "tennis shoes, basketball shoes, gym shoes, training shoes and the like" is "*defined* by Additional U.S. Note 2 to Chapter 64 as all 'athletic footwear' subject to certain exceptions which the parties agree do not apply to the Teva® sport sandals". Plaintiff's Brief, pp. 2–3 (emphasis in original). It postulates that

> Congress eliminated the need to make subjective determinations as to whether shoes other than the named exemplars are "like" the named exemplars. It laid this issue to rest by putting the named exemplars and any shoes like them in one defining basket: "athletic footwear." Hence, there is no need to make the subjective and contentious determinations of what is "like" as

---

[5] *See* Complaint, para. NINTH:

> If the imported merchandise is described in both subheading 6404.19.35, HTSUS, and subheading 6404.11.80, HTSUS, classification under subheading 6404.11.80, HTSUS, is required since that is the provision which contains the most specific description of the merchandise under G[RI] 3(a), HTSUS.

> suggested by defendant since Congress has defined the entire term including the exemplars and the term "and the like" as meaning athletic footwear.

Id. at 7. On its face, however, the language of that additional note is not so convincing, stating only that, for

> the purposes of this chapter [64], the term "*tennis shoes, basketball shoes, gym shoes, training shoes and the like*" covers athletic footwear other than sports footwear (as defined in subheading note 1 . . .), whether or not principally used for such athletic games or purposes.

Emphasis in original. Thus, to attempt to extrapolate therefrom congressional intent to substitute, for purposes of interpreting subheading 6404.11.80, "athletic footwear" for the list of exemplars and their like is tenuous. *Cf.* Defendant's Brief, pp. 16–17:

> The plaintiff's interpretation of Note 2 [ ] is incorrect because it gives no effect to the language, "tennis shoes, basketball shoes, gym shoes, training shoes and the like." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)("In construing a statute we are obliged to give effect, if possible, to every word Congress used"); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). If Congress had intended the meaning urged here by the plaintiff, it would not have included the named exemplars - and surely would not have included the language "and the like" - in Note 2 and subheading 6404.19.35, HTSUS. Instead, Congress would have provided simply for "athletic footwear other than sports footwear (as defined in subheading Note 1 above). . . ."[6]

Moreover, the additional note does not purport to cover all athletic footwear[7], a point that arguably finds contextual support in that the

> antecedent basis for "such athletic games or purposes" is the game or purpose for which a tennis shoe, basketball shoe, gym shoe, training shoe and the like is worn.

Id. at 17.

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[6] The plaintiff correctly points out on page 7 of its brief that

> the defined statutory phrase in issue and its "exemplars," which are found in subheading 6404.11, were not creations of Congress, but rather were part of the six-digit International Harmonized Schedule language which the United States agreed to adopt subject to the right to make changes beyond the 6 digit level as was done in this case. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n.1 (Fed.Cir. 1999).

[7] *See* Defendant's Brief, p. 16.

B

Although this court has been unable to locate legislative light on the intended practical impact of the additional U.S. note on subheading 6404.11, the changes engendered by the enactment of the HTSUS, effective January 1, 1989 [8], do provide a background therefor.

(1)

Prior to harmonization, footwear was classified in accordance with the headings of U.S. Tariff Schedule 7, Part 1. And, although "athletic footwear" does not now appear in any heading or subheading of HTSUS chapter 64, it did appear in that schedule for the year 1987, for example. Moreover, Subpart A statistical headnote 1(a) explained that

> the term "*athletic footwear*" covers footwear of special construction for baseball, football, soccer, track, skating, skiing, and other athletic games, or sports[.]

Unlike the harmonized system of today, however, its predecessor did not, by name, provide for "sports footwear". Yet, the juxtaposition of that schedule's description of athletic footwear, quoted above, with the current description of sports footwear in Subheading Note 1 to chapter 64, quoted below, at least evokes some sense of continuity:

> For the purposes of subheading[ ] . . . 6404.11, the expression "*sports footwear*" applies only to:
>
> (a) Footwear which is designed for a sporting activity and has, or has provision for the attachment of spikes, sprigs, cleats, stops, clips, bars or the like;
>
> (b) Skating boots, ski-boots and cross-country ski footwear, snowboard boots, wrestling boots, boxing boots and cycling shoes.

In a general sense, what was once seemingly considered athletic footwear is now considered sports footwear.

(2)

Amidst such re-organization and -characterization, the HTSUS introduced "tennis shoes, basketball shoes, gym shoes, training shoes and the like". As stated, it is plaintiff's interpretation of Additional U.S. Note 2 in connection therewith, and specifically the casual use of the term "athletic footwear", that gives it cause to end its inquiry

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[8] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, §§ 1201–17, 102 Stat. 1107, 1147–65.

as to the scope of its preferred subheading. Without more convincing support that such rote substitution was the intent of Congress, however, this court cannot, and therefore does not, do the same.

C

Instead, this court opts for a more deliberate construction of subheading 6404.11 in accordance with the rule of *ejusdem generis*.[9]

> Under th[at] rule . . . , which means "of the same kind," where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified.
>
> *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed.Cir. 1994) . . . ; *see generally* 2A Norman J. Singer, *Statutes and Statutory Construction*, § 47.17, at 273 (6th ed. 2000) ("Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.").

Micron Technology, Inc. v. United States, 243 F.3d 1301, 1308 (Fed.Cir. 2001). Such construction

> requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms. *Nissho-Iwai Am. Corp. v. United States*, 10 Ct.Int'l Trade 154, 157, 641 F.Supp. 808, 810 (1986).

Sports Graphics, Inc. v. United States, 24 F.3d 1390, 1392 (Fed. Cir. 1994).

Resorting to various dictionary definitions, the defendant maintains that appearance is of paramount importance for determining whether the subject merchandise is like the exemplars:

> Each of the exemplars listed in subheading 6404.11.80, HTSUS, namely tennis shoes, basketball shoes, gym shoes and training shoes, along with sneakers, jogging shoes and running shoes, as defined in general lexicons or the *Footwear Dictionary* (1994), fully enclose the wearer's foot to provide a secure and

---

[9] *See, e.g., Economy Cover Corp. v. United States*, 76 Cust. Ct. 130, C.D. 4645, 411 F.Supp. 783 (1976). Though the defendant argued for the application of *ejusdem generis* in its motion opposing trial, it has since decided that the rule "is not applicable here because the statutory language, 'tennis shoes . . . and the like,' is not in doubt, and has a plain meaning". Defendant's Brief in Reply, p. 11 (citation omitted). *But see* Plaintiff's Brief, p. 15. *See also* HQ 081746 (Dec. 1, 1998) ("The wading boots at issue would not be considered athletic shoes under the HTSUS as they are not ejusdem generis to the shoes listed in Additional U.S. Note 2 to Chapter 64").

> supportive enclosure that is not open at the toe, heel, top or sides.[10]
>
> * * *
>
> Because the sandals in issue are open at the toe, heel, top and sides, and do not fully enclose the wearer's foot, they differ from the exemplars of subheading 6404.11.80, HTSUS.[11]

That the sandals do not resemble, at least in appearance, the exemplars is not challenged by the plaintiff, which instead focuses on the use thereof. *See* Plaintiff's Brief, p. 10:

> Teva® sport sandals may not look like tennis shoes, etc., but plaintiff will demonstrate that they are used in place of tennis shoes, etc. for athletic purposes and in many instances outperform these other types of athletic footwear.

Furthermore:

> . . . Plaintiff will demonstrate at trial that Teva® sport sandals are used in athletic activities, where in the past wearers used tennis shoes, sneakers, etc. For certain athletic activities, Teva® sport sandals are preferred.

Id. at 10–11.

> . . . The common characteristic or purpose of the named exemplars in the subject tariff provision is that they are athletic footwear and are within the same class or kind of merchandise, i.e., athletic footwear.

Id. at 15.

And while a likeness in either of the two categories might well satisfy the rule (in the light of its disjunctive formulation), Customs Ruling HQ 963395 (April 2, 2002) explains the significance of physical disparities in terms of their effect on use:

> . . . We find that the sandals are not . . . "like" the named exemplars, each of which provides, at a minimum, a secure and supportive enclosure for the foot. None of the named exemplars is generally considered to be footwear that is open at the toes or the heel, while the sandals are open in both areas. Unlike the sandals, none of the named exemplars is generally touted for use in the sporting activities of swimming or surfing. Although many types of sandals can be, and in fact are, used in running, the features of open toes, heels, sides, and tops would appear to

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[10] Defendant's Brief, pp. 12–13, citing Foley Declaration, para. 8 and Defendant's Exhibit B.

[11] *Id.* at 15, citing Foley Declaration, paras. 5, 9.

> have significant drawbacks. Without the enclosure and support offered by a shoe like a tennis, basketball, gym, or training shoe, the foot is freer to slide in various directions. Depending on weather, terrain, etc., the open nature of the sandals also permits relatively easy entry of moisture, soil, pebbles, twigs, etc., into spaces between the foot and the footwear. While such factors may amount to mere nuisance, they may also require erratic changes in gait or occasional stops to remove foreign matter, adjust straps, or rest, in order to avoid injury, none of which is conducive to the fast footwork of a sporting activity.[12]

Such consideration is appropriate when *eo nomine* exemplars indicate use and possess an appearance that is dictated by that use. In *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed.Cir. 1999), for example, the court stated that "a use limitation should not be read into an *eo nomine* provision unless the name itself inherently suggests a type of use", citing *Pistorino & Co. v. United States*, 66 CCPA 95, C.A.D. 1227, 599 F.2d 444 (1979), and *United States v. Quon Quon Co.*, 46 CCPA 70, C.A.D. 699 (1959). To quote from *Quon*,

> use is an important factor in determining classification though an eo nomine designation is involved.
>
> * * *
>
> . . . We are not so trusting of our own notions of what things are as to be willing to ignore the purpose for which they were designed and made and the use to which they were actually put. Of all things most likely to help in the determination of the identity of a manufactured article, beyond the appearance factors of size, shape, construction and the like, use is of paramount importance. To hold otherwise would logically require the trial court to rule out evidence of what things actually are every time the collector thinks an article, as he sees it, is specifically named in the tariff act.

46 CCPA at 72–73. *See also Myers v. United States*, 21 CIT 654, 660–61, 969 F.Supp. 66, 72 (1997).

To determine common meaning, "the court may consult dictionaries, lexicons, scientific authorities, and other such reliable sources". *Lonza, Inc. v. United States*, 46 F.3d 1098, 1106 (Fed.Cir. 1995), citing *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 69 CCPA 128, 133–34, 673 F.2d 1268, 1271 (1982). The *Complete* Footwear Dictionary (Rossi ed. 1994), a lexicon used by the industry, defines "gym

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[12] Defendant's Exhibit E, pp. 3–4. In T.D. 92–32 (*Tariff Classsification of Protective Footwear*), 26 Cust.B.& Dec. 98 (1992), Customs declined to find that hiking/backpacking boots fit the term "tennis shoes, basketball shoes, gym shoes, training shoes and the like". It reasoned that the boots were too heavy to qualify, noting that "[a]ll the exemplars are used in sports which require fast footwork or extensive running". 26 Cust.B.& Dec. at 112.

shoe" on page 55 as "[s]neaker-type[13] footwear used for gymnasium activities or sports". On pages 134–35, it also provides the following definitions:

> **sports shoe.**[14] An athletic shoe designed for any particular kind of active sport. Each sport usually has its own shoe design requirements. Many sports shoes are variations of others, usually with one or more additional features to adapt to the
>
> special needs of the particular sport. Also known as an "athletic shoe." The main types of sports shoes are as follows:
>
> * * *
>
> **basketball.** The shoe may be either hightop or lowcut, with upper of canvas, nylon/canvas, or leather/canvas, laced to toe, reinforced toe tip, padded collar, cushioned insoles, or sometimes a removable orthotic insole insert. The traction sole is either rubber or polyurethane. Air holes are in the upper for added ventilation.
>
> * * *
>
> **tennis.** Canvas or leather/nylon mesh upper with ventilation holes, upper cut a bit higher than ordinary low-cut shoe; firm counter, underfoot cushioning, padded collar and tongue, lace-to-toe, protective toe tip. Sole design depends on playing surface (grass, clay) and can vary from moderate to high traction.[15]

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[13] Sneaker is defined therein on page 132 as "[f]ootwear with a rubber sole and upper of canvas or other materials, constructed on the vulcanized process". The term "vulcanized" therein refers to a process whereby

> a rubber tape, about ¾ inch wide and 1/16 inch thick, is attached to the side or the top of the edge of the rubber outsole and over the bottom ½ inch or so of the upper, which could be made of any material. After the curing in the vulcanizing oven, it is virtually impossible to separate the rubber components which have been joined since they have basically been fused together. In addition to being extremely strong, a rubber-to-rubber "vulcanized" joint will not be weakened by immersion in water.

Footwear Definitions, T.D. 93–88, 27 Cust.B.& Dec. 312, 322 (1993).

[14] In addition to introducing basketball and tennis shoes, "sports shoe" is also referenced as the object of a "see" signal (on page 148) where the definition of "training shoe" would otherwise be found. It is also worth noting that, according to defendant's brief, page 11, note 4, a later edition of The *Complete* Footwear Dictionary (2d ed. 2000) does indeed define training shoe on page 174 as follows:

> . . . Also known as cross-trainer. A sports shoe similar in design and construction to a professional shoe used in a given sport, such as track or basketball, but can also be used for casual wear.

[15] Boldface in original. Excerpts from this dictionary have been provided by the defendant as Exhibit D. Counsel state that the

Tennis shoe is also defined in Webster's Third New International Dictionary Unabridged (1981), page 2356, as

> *n* : a light shoe worn esp. in playing tennis and generally made of canvas with a rubber sole — compare SNEAKER[.]

And although that lexicon does not define "gym shoe" *per se*, it also refers the reader to "SNEAKER" which it defines on page 2156 as

> **3:** a shoe usu. of canvas with a pliable rubber sole worn esp. for sports or hiking[.]

IV

This court cannot grant defendant's motion for summary judgment. While factual determinations by Customs are entitled to a presumption of correctness, it is a rebuttable one. *See, e.g., Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed.Cir. 2002). To preclude an attempt at rebuttal herein by the plaintiff would run contrary to the foundation of disposition by summary judgment, namely, that there be "no genuine issue as to any material fact". USCIT Rule 56(c). Although Customs may prevail upon its opinion that the openness of plaintiff's sandals prevents their use in activities implied by the statutory exemplars, that is a material element of the disagreement at bar. In other words, while the reasoning in the ruling letter deserves deference, the conclusion derived therefrom is founded on a factual premise that the plaintiff does not concede — in the absence of evidence adduced in open court.

Ergo, defendant's motion for summary judgment must be, and it hereby is, denied. Counsel are to confer and propose to the court on or before January 20, 2006 a schedule for trial.

So ordered.

Footwear Dictionary (1994) has been used as a reference by the Customs' National Import Specialist on footwear and by testing laboratories in the United States, and is often cited by legal representatives of importers in administrative matters before Customs.

Defendant's Brief, p. 10 n. 3, citing Foley Declaration, para. 7.

Slip Op. 05–160

UNITED STATES, Plaintiff, v. OPTREX AMERICA, INC., Defendant.

Court No. 02–00646
Before: Judge Judith M. Barzilay

MEMORANDUM OPINION AND ORDER

[Plaintiff's motion requesting leave to amend its complaint to add new counts is denied.]

Dated: December 15, 2005

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, (*Patricia M. McCarthy*), Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Frederick B. Smith*, Assistant Chief Counsel, Bureau of Customs and Border Protection, of counsel, for the plaintiff.

Sonnenberg & Anderson (*Steven P. Sonnenberg* and *Michael Jason Cunningham*) for the defendant.

Barzilay, Judge: In this 19 U.S.C. § 1592 penalty action, Plaintiff, the United States Bureau of Customs and Border Protection ("Customs" or "government"), moved for leave to amend its complaint pursuant to USCIT Rule 15(a). Plaintiff seeks to add two additional claims against Defendant, Optrex America, Inc. ("Optrex"). Specifically, the government wants to charge Optrex with higher levels of culpability than initially claimed - gross negligence and fraud. In connection with these new claims, the government also seeks to add new entries. For the reasons outlined below, the court DENIES Plaintiff's motion.

BACKGROUND

Customs initiated its penalty proceedings against Optrex in May 2002, issuing a prepenalty notice pursuant to 19 U.S.C. § 1592(b)(A), which alleged that Optrex's negligence resulted in a violation. The pre-penalty notice charged Optrex with providing insufficient information in the entry documents to enable Customs to determine the correct classification of its imported liquid crystal display ("LCD") products. In response to the pre-penalty notice, Optrex claimed that it had exercised reasonable care by consulting its counsel, its broker, and Customs about the correct classification. *Ex. H10* at 5–9, 12. Optrex furnished Customs with a "decision tree," a classification scheme that reflected the company's classification policies. *Ex. H10* at 7. Customs rejected Optrex's reasonable care defense on the basis "that reliance on a broker or exporter alone may not be sufficient to show that an importer exercised reasonable care." *Ex. H12* at 5 (citing *United States v. Golden Ship*, 25 CIT 40 (2001)). Customs noted that it did not have "persuasive evidence that during the subject time period the petitioner sought or received expert advice from

any of the outside sources it identified." *Ex. H12* at 6. Customs was also "unaware of any persuasive evidence establishing what specific advice these sources allegedly provided the petitioner." *Ex. H12* at 6–7. It concluded that the alleged misclassification amounted to more than a professional disagreement given the "[n]umerous customs rulings, courts decisions, and informed compliance publications issued regarding the classification of LCDs." *Ex. H12* at 6. It also believed that Optrex developed the decision tree after filing the entries and only for the purpose of satisfying Customs, since "the petitioner has not produced any evidence that the decision tree method was ever used by anyone at Optrex to determine a classification." *Ex. H12* at 6–7. The final penalty claim against Optrex was based on negligence.

The government initiated this action in October 2002, claiming that between October 12, 1997, and June 29, 1999, Optrex introduced into the commerce of the United States certain LCD products by means of negligent material false statements in violation of 19 U.S.C. § 1592. Plaintiff's original complaint was premised on the theory of negligent misclassification of the LCD products under HTSUS heading 8513, instead of HTSUS heading 9013, in violation of the Federal Circuit's decision in *Sharp Microelecs. Tech., Inc. v. United States*, 122 F.3d 1446 (Fed. Cir. 1997). *See Compl.* ¶¶ 10–12.

In this motion, Plaintiff avers that it unearthed evidence establishing a basis for fraud and gross negligence claims under section 1592 following this court's order compelling Optrex to reveal certain of its attorney-client communications. *See United States v. Optrex*, Slip Op. 04–79 (CIT July 1, 2004) ("July 2004 order"); *Pl.'s Mot. Requesting Leave Amend Compl.* at 3. Based on the discovery of this new evidence, the government now seeks leave to amend its complaint to plead penalties for fraud and gross negligence and to reach back to capture entries made by Optrex starting in January 1997. The government argues that prior to this discovery, it attempted to obtain information concerning the substance of the legal advice that Optrex received from its counsel in order to evaluate Optrex's reasonable care defense.[1] Optrex apparently withheld such information until the court's July 2004 order.

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[1] For its reasonable care defense, Optrex claimed that it consulted with an attorney having expertise about the subject merchandise. The legislative history to the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057 (1993), noted that in seeking advice for a classification issue, an importer is expected to consult with an attorney having technical expertise, provide the expert with full and complete information sufficient for the expert to make entry or to provide advice as to how to make entry. H. Rep. No. 103–361(I) at 120 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2552, 2670. The Ways and Means Committee noted that "an honest, good faith professional disagreement as to correct classification of a technical matter shall not be lack of reasonable care unless such disagreement has no reasonable basis." *Id.*

At an evidentiary hearing held on February 17, 2005, the government proffered three letters from Optrex's counsel to Optrex containing legal advice on the LCD products classification and the deposition of a former Optrex employee stating that Optrex consistently chose to classify its products under lower tariffs. *See Ex. H1, Ex. H2, Ex. H3.* The government avers that this evidence forms a basis for its belief that 1) Optrex disregarded its counsel's advice, 2) Optrex had knowingly misclassified the subject entries of LCD products and kept a separate account upon its books and records based on the amount of duties that it should have paid, 3) the "decision tree" was created as a cover up. The government claims that Customs did not have sufficient basis to pursue the claims of gross negligence and fraud during the administrative proceedings because this information was not discoverable in the administrative proceedings, and, therefore, it should be allowed to add two additional counts for gross negligence and fraud against Optrex

DISCUSSION

USCIT Rule 15(a) provides that the court should grant a party's motion for leave to amend its complaint "freely . . . when justice so requires." USCIT R. 15(a). The court decides such motions on a case-by-case basis, considering a variety of factors, including "(1) the timeliness of the motion to amend the pleadings; (2) the potential prejudice to the opposing party; (3) whether additional discovery will be necessary; [and] (4) the procedural posture of the litigation." *Budd Co. v. Travelers Indem. Co.*, 109 F.R.D. 561, 563 (E.D. Mich. 1986) (citation omitted). In this case, Plaintiff is seeking to amend its complaint to add two additional claims against Defendant, maintaining that it did not have a basis to pursue higher levels of culpability at the administrative level. In this case, the threshold issue turns on whether the Department of Justice can bring a "civil penalty" action pursuant to 19 U.S.C. § 1592(e) to recover a penalty claim for a type of violation - namely, gross negligence or fraud - not made before the agency. *See* 19 U.S.C. § 1592 (2004). Because section 1592 provides for specific administrative proceedings prior to the commencement of a recovery action before the court, this inquiry directly concerns the court's exercise of jurisdiction over penalty claims that were not pursued at the administrative level. The court has "exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover a civil penalty under [19 U.S.C. § 1592]." 28 U.S.C. § 1582. In a section 1592 action, the court must, "where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637.

The government claims that section 1592 does not prevent it from bringing claims before this Court for increased culpability levels because the relevant provisions of the law provide for a *de novo* stan-

dard of review in penalty actions.[2] "[S]o long as the United States *commences* a section 1592 action, there is no limitation upon the "issues" addressed or the "amount of the penalty." *Pl. Br.* 11–12 (emphasis in original). Plaintiff thus maintains that the level of culpability is one of the issues that this Court decides independent of the administrative proceedings underlying each penalty action. The court, however, disagrees with the government's reading of section 1592 with respect to its definition of a "penalty claim."

1. *Section 1592*

Section 1592 delineates the administrative procedural requirements for Customs' penalty proceedings. *See* 19 U.S.C. § 1592(b) (2004). When it has "reasonable cause to believe that there has been a violation," Customs has to first issue a pre-penalty notice "of its intention to issue a claim for a monetary penalty." *Id.* The pre-penalty notice must:

> (i) describe the merchandise;
> (ii) set forth the details of the entry or introduction, the attempted entry or introduction, or the aiding or procuring of the entry or introduction;
> (iii) *specify all laws* and regulations allegedly violated;
> (iv) disclose all the material facts which establish the alleged violation;
> (v) state *whether the alleged violation occurred as a result of fraud, gross negligence, or negligence*;
> (vi) state the estimated loss of lawful duties, taxes, and fees if any, and, taking into account all circumstances, the amount of the proposed monetary penalty; and
> (vii) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.

§ 1592(b)(1)(A) (emphasis added). "After considering representations, if any" made by the importer, upon Customs' determination

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[2] 19 U.S.C. § 1592(e) states:
Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section—
(1) all issues, including the amount of the penalty, shall be tried de novo;
(2) if the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence;
(3) if the monetary penalty is based on gross negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation; and
(4) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.

that a violation has occurred, Customs has to issue a "penalty claim," which "specif[ies] all changes in the information provided under clauses (i) through (vi) of paragraph (1)(A)." § 1592(b)(2)

Following the mandatory issuance of a "written penalty claim," the importer is afforded an opportunity to "make representations . . . seeking remission or mitigation of the monetary penalty" under 19 U.S.C. § 1618. *Id.* Finally, Customs provides the importer with a written statement "which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based." 19 U.S.C. § 1592. If the liable importer fails to petition for relief or to pay the penalty, Customs can then refer the case to the Department of Justice. *See* 19 C.F.R. § 162.32.

The language of section 1592 evidences that the level of culpability forms the core around which the government must construct each penalty claim it wishes to bring: Each level of culpability generates a new separate claim. Subsection 1592(b) makes the level of culpability an essential element of the "violation" for which a "penalty" is claimed. *See* § 1592(b)(1)(A)(v). Subsection 1592(c) sets out the maximum monetary penalty for each type of violation - negligence, gross negligence, and fraud - treating each as a different "civil penalty." *See* 19 U.S.C. § 1592(c). In addition, reading section 1592(e) *in pari materia*[3] with section 1592(b), the language "any monetary penalty claimed" before this Court refers back to the "written penalty claim" issued in the administrative proceedings, suggesting that it is the same claim. The term "recovery" underscores that a 1592 action before this Court is an enforcement suit allowing the government to recover on a claim that it perfected in the administrative proceedings.[4] *See* 19 U.S.C. § 1592.

The government argues that the "notwithstanding any other provision of law" clause combined with the *de novo* review provision en-

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[3] *Cf. Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127–28 (1995) (explaining application of this rule of construction in interpreting two subsections of statute). "This [*in pari materia*] principle of statutory construction provides that legislative intent 'is to be deduced from the whole statute and every material part of the same.' " *Dal-Tile Corp. v. United States*, 17 C.I.T. 764, 768, 829 F. Supp. 394, 397 (1993) (citations omitted).

[4] Such interpretation views section 1592(e) as creating a cause of action for the United States to enforce a penalty claim before this Court. Customs' own regulations do not shed light on how to interpret the statute, but refer to the proceedings before this Court as "civil enforcement" of section 1592 claims:

> A monetary penalty incurred under section 592 . . . may be remitted or mitigated under section [19 U.S.C. § 1618] . . ., if it is determined that there are mitigating circumstances to justify remission or mitigation. . . . The guidelines below will be used by the Customs Service in arriving at a just and reasonable assessment and disposition of liabilities arising under section 592 within the stated limitations. . . . The assessed penalty or penalty amount set forth in Customs administrative disposition determined in accordance with these guidelines does not limit the penalty amount *which the Government may seek in bringing a civil enforcement* action pursuant to section 592(e).

19 C.F.R. Pt. 171, App. B (emphasis added).

forces its argument that "as long as the United States *commences* a section 1592 action, there is no limitation upon the 'issues' addressed or the 'amount of the penalty.' " *Pl. Br.* 11–12. The "notwithstanding any other provision of law" clause generally "connotes a legislative intent to displace any other provision of law that is contrary to the [statute]." *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (2004). The "notwithstanding any other provision of law" clause in section 1592 modifies each of the four subparagraphs that follow the clause: subparagraph (1) addresses *de novo* review; subparagraphs (2) to (4) address the burden of proof for each type of violation. For example, the modification of the *de novo* standard of review by the "notwithstanding" clause emphasizes lack of deference to Customs' final determination, including its findings of fact under section 1592(b)(2).[5] The court's power to review penalty claims *de novo* under 19 U.S.C. § 1592(e) ensures that the defendant receives a hearing without any deference to the agency's findings, placing the burden of proof on the government. However, the *de novo* standard refers to the issues in the context of a specific claim based on one of three types of section 1592 violations and does not allow the court to review entirely new penalty claims.

Finally, a meaningful interpretation of a statute must take into account the statute's basic purpose. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003). The statute was designed to give an importer an opportunity to fully resolve a penalty proceeding before Customs, before any action in this Court:

> If the customs officer issues a penalty claim and the importer petitions for mitigation under [19 U.S.C. § 1618], then the importer would have the opportunity to make written and oral representations to the service. Notice of the final decision in a mitigation proceeding, including findings of fact and conclusions of law, would be required to be sent to the importer. This provision would enact into law existing practice with several changes: (1) the importer would have the right to make representations in a mitigation proceeding before any decision on mitigation is made, and (2) the service would be required to

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[5] Section 1592(b)(2) provides for a mitigation procedure following the agency's written penalty claim and then final determination:

> The written penalty claim shall specify all changes in the information provided under clauses (i) through (vi) of paragraph (1)(A). Such person shall have a reasonable opportunity under section 1618 of this title to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. At the conclusion of any proceeding under such section 1618, the Customs Service shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

19 U.S.C. § 1592(b)(2).

> supply the importer with a detailed explanation of the factual and legal basis for its mitigation decision.
>
> If an importer refuses to pay a section 592 monetary penalty and is sued by the United States in a district court[6], all issues, including the appropriateness of the penalty amount, would be considered by the court.

S. Rep. 95–778, at 19–20 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2211, 2230–31. Thus, the legislative history supports the analysis that the administrative penalty claim underlies the suit brought by the United States under section 1592(e).

2. *Exhaustion of Administrative Remedies*

The government alternatively argues that the Court should waive the exhaustion of administrative remedies in this case and allow it to add its claims of gross negligence and fraud. At the hearing, by way of testimonial and documentary evidence, and through its submission of supplemental documents, the government demonstrated that Customs did not have sufficient bases to pursue fraud on the administrative level because it could not have discovered relevant evidence prior to the court's July 2004 order. After careful examination of the law, however, the court declines to waive the exhaustion of administrative remedies because the remedies involved in this case are mandated by the statute.

The relevant statute provides that "[i]n any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637. The government argues that by excluding section 1592 actions from the mandatory exhaustion requirement, Congress intended that the Court not be constrained by the penalty notice issued by Customs. Indeed, in some penalty actions, where "sufficient compliance with the statutory procedures was found," the courts have waived certain aspects of administrative procedures under section 1592(b). *United States v. Aegis Sec. Ins. Co.*, Slip Op. 05–278, at 3, 2005 WL 2740876 (CIT Oct. 24, 2005) (denying defendant's motion to dismiss duty collection suit despite pending administrative proceedings with respect to penalty claims, finding that collection of duties may proceed whether or not penalties are assessed). Importantly, with one exception, the exhaustion of administrative remedies has been waived regarding procedural requirements under Customs' regulations, not the statutory requirements of section 1592. *See, e.g.*, *United States v. Maxi Switch, Inc.*, 22 CIT 778, 785,

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[6]The Customs Courts Act of 1980 substituted the text "proceedings commenced by the United States in the Court of International Trade" for "proceedings in a United States district court commenced by the United States pursuant to section 1604 of this title" in section 1952(e). *See* Pub. L. 96–417

18 F. Supp. 2d 1040 (1998) (finding that Customs' premature referral of case to Department of Justice was harmless because of importer's untimely filing of its supplemental petition); *United States v. Obron Atl. Corp.*, 18 CIT 771, 775–76, 862 F. Supp. 378, 382 (CIT 1994) (finding jurisdiction where Customs improperly imposed seven-day response period because defendant was not deprived of opportunity to be heard as it submitted materials and made oral representations following both pre-penalty and penalty notices); *United States v. Modes, Inc.*, 13 CIT 780, 785, 723 F. Supp. 811, 815 (1989) (finding jurisdiction where Customs did not respond to supplemental petition because defendant was not deprived of opportunity to be heard as it made oral presentation and was provided with written determination stating findings of fact and conclusions of law supporting decision to mitigate).

In one case, the Federal Circuit waived a statutorily prescribed administrative requirement. *See United States v. Priority Prods., Inc.*, 793 F.2d 296, 299 (Fed. Cir. 1986). In *Priority Products*, the Federal Circuit found that, although the penalty claim in that case was originally assessed against the company and not its shareholders personally, the shareholders were on notice of the penalty assessed against their company and could be directly sued in the penalty action. *Id.* The Federal Circuit concluded that "nothing in [§ 1592] or its legislative history demonstrate [sic] that Congress intended to narrowly circumscribe the subject matter jurisdiction of [this Court] to encompass only those suits brought by the Government against parties expressly named in the administrative proceedings." *Id.* Specifically, the Court of Appeals stated that "so long as some 'civil penalty exists' the Court of International Trade can assume jurisdiction over any complaint to recover that penalty, and the issue of who is ultimately responsible for payment of the penalty is subject to *de novo* consideration." *Id.* This case is distinguishable, however, because the Federal Circuit considered how Customs could "preserve its right to sue all possible parties" when pursuing a penalty action against a corporation. *Id.* at 300.

In the pending case, the court declines the government's invitation to waive statutorily prescribed administrative procedures because no precedent supports waiving all statutory requirements for a particular claim. Such a waiver would require the court to consider a claim that did not go through administrative proceedings, vitiating the entire statutory framework.[7] Additionally, bringing a new gross

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[7] In connection with its fraud claim, the government's proposed amended complaint also seeks to add new entries of subject merchandise that were made in the first half of 1997. These new entries were not part of the pre-penalty or penalty notices. As the court finds that section 1592 does not permit the government to add different levels of culpability not pursued on the administrative level, addition of new entries in connection with the government's fraud claim is not an issue in this case. However, as with the level of culpability, the identity of each entry is a central element of any penalty claim. *See* 19 U.S.C. § 1592(b) (re-

negligence or fraud claim would require more than just an exhaustion of administrative remedies; it would result in denial of the protections afforded by the statute of limitations.

3. *Statute of Limitations*

The government suggests that due to Defendant's concealment of information on the administrative level, it was unable to obtain information to pursue a gross negligence claim. At the evidentiary hearing, Customs demonstrated that it could not have discovered evidence of gross negligence during the five-year window. However, this argument is not relevant in this case because Congress specifically established a statute of limitations of five years from the date of entry of subject merchandise for negligence and gross negligence claims. *See* 19 U.S.C. § 1621(1). The statute of limitations is designed to ensure that penalty proceedings are conducted with reasonable dispatch and that penalty claims have finality after a certain date. This five-year statute of limitations for bringing a penalty action enables the government to complete full administrative proceedings: conduct investigation, issue a pre-penalty notice, a notice of penalty claims, and 19 U.S.C. § 1618 mitigation procedures. In this case, the importer refused to waive the relevant statute of limitations of five years from the date of entry for negligence and gross negligence claims in response to Customs' request, and Customs was on notice that it would not be able to pursue gross negligence after five years for all entries it investigated.

Congress specifically has addressed cases where importers act in bad faith and conceal information that is later discovered by providing that the statute of limitations for fraud claims begins to run from the date of discovery of fraud. *See* 19 U.S.C. § 1621(2). *Cf. US JVC Corp. v. United States*, 22 CIT 687, 691, 15 F. Supp. 2d 906, 911 (1998) ("The doctrine of equitable tolling permits a plaintiff to avoid the bar of a statute of limitations, if 'despite all due diligence, [the plaintiff] is unable to obtain essential information concerning the existence of [his] claim.' " (quoting *Weddel v. Sec'y of Health and Human Servs.*, 100 F.3d 929, 931 (Fed. Cir. 1996)). Thus, even if the government proves that it did not have access to certain information that led to its discovery of a basis to pursue gross negligence until five years from the date of the last entry at issue in this case, waiving the statute of limitations for gross negligence is not appropriate

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quiring that Customs "set forth the details of the entry or introduction" of subject merchandise in pre-penalty notice). The government cannot bypass this unambiguous statutory provision as it ensures that an importer is on notice of which entries it is responsible for in a section 1592 penalty enforcement action. *Cf. United States v. Rotek, Inc.*, 22 C.I.T. 503, 508, 509–10 (1998) (not reported in F. Supp.) (retaining jurisdiction where importer claimed "shifting, inconsistent claims" in pre-penalty notice, penalty notice, and mitigation decision, noting that items included in complaint were "the exact items described in the penalty notice and the mitigation decision").

where allegedly fraudulent concealment is involved and pursuing a fraud claim remains an option. The discovery of fraud rule ensures that the government will not lose out on revenue when fraud is involved. In this case, the government would have five years from the date it discovered the alleged fraud to sue Optrex on that claim. However, prior to that it must perfect its fraud claim by conducting the statutorily required procedures.

CONCLUSION

Section 1592 provides for a mandatory issuance of a "written penalty claim," which underlies a recovery action before this Court. The level of culpability is an inextricable part of a particular penalty claim issued pursuant to section 1592(b)(2), and allowing the government to amend its complaint to include penalty claims that have not been perfected through the administrative process would be contrary to the statutory scheme and the statute of limitations. Furthermore, despite the timing of the discovery of new evidence, this case does not merit a waiver of administrative remedies. Therefore, it is hereby

ORDERED that Plaintiff's motion for leave to amend its complaint to add the culpability levels of fraud and gross negligence and new entries is DENIED.

SLIP OP 05–161

DECCA HOSPITALITY FURNISHINGS, LLC, Plaintiff, MARIA YEE INC., *ET AL.*, Plaintiff-Intervenors, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR FAIR TRADE, *ET AL.*, Defendant-Intervenors.

Before: Pogue, Judge
Court No. 05–00002

JUDGMENT

In *Wooden Bedroom Furniture from China*, 70 Fed. Reg. 329, 330 (Dep't Commerce Jan. 4, 2005) (notice of amended final determination of sales at less than fair market value and antidumping duty order) the Department of Commerce ("Commerce") rejected as untimely certain submissions from Decca Hospitality Furnishings, LLC ("Decca") and, therefore, assessed Decca the People's Republic of China ("PRC")-wide cash deposit rate of 198.08%. Decca timely appealed that determination averring that it was improperly denied the separate rate of 6.65%. On August 23, 2005, this court found unlawful Commerce's assessment of the PRC-wide cash deposit rate

and remanded to Commerce the question of whether Decca had received actual notice of the separate-rate filing requirements, and if it had not, to consider whether Decca was entitled to a separate rate. *Decca Hospitality Furnishings, LLC v. United States*, 29 CIT ____, ____, 391 F. Supp. 2d 1298, 1317 (2005).

Pursuant to that remand order, Commerce issued a remand determination on November 7, 2005 finding that Decca had not received actual notice of the filing requirements and, therefore, Decca did qualify for separate-rate treatment in accordance with the court's decision.

This court, having received and reviewed Commerce's Remand Results, comments and rebuttals thereto, finds that Commerce duly complied with the court's remand order. Therefore, it is hereby

ORDERED that the Department of Commerce's remand determination is supported by substantial evidence, and otherwise in accordance with law; and it is further

ORDERED that the Remand Results filed by Commerce on November 7, 2005 are affirmed in their entirety.

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